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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

BEN GARRISON, as Personal Representative of the Estates of Ralph and Molly Garrison,
Petitioner,

v.

JOSEPH POLISAR, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. IF THE ANALYSES FOR QUALIFIED IMMUNITY AND EXCESSIVE FORCE MERGE, AS FIVE CIRCUITS HAVE FOUND, BUT AS SIX CIRCUITS HAVE REJECTED, SHOULD THE COURT OR THE JURY RESOLVE THIS MERGED INQUIRY?

II. IS THE COURT OF APPEALS PERMITTED TO DEFER TO THE TRIAL COURT'S DETERMINATION OF STATE LAW UNDER SALVE REGINA COLLEGE V. RUSSELL, 499 U.S. 225 (1991)?

PARTIES TO THE PROCEEDING

Petitioner is Ben Garrison as the Personal Representative of the Estates of Ralph Garrison, deceased, and Molly Garrison, deceased. Petitioner is an individual and has no corporate affiliations.

Respondents are Joseph Polisar, Ruben Davalos, J. R. DeBuck, Judd Schaffer, Kevin McCabe, Steve Rodriguez, Howard Neal Terry, Charles Lopez, Christina Baca, Mary Patrick, Mary Marquez, and Gilbert Duran ("City Respondents"), in their individual and official capacities; and, Joseph Bowdich, Kenneth Bozell, David Linthicum, Larry Stebleton, Erik Little, James Monteith, James Gonzales, Patrick Lucero, Fermin Ortega, Greg Reese, David Archibeque, and Van Eldredge ("County Respondents"), in their individual and official capacities.

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OPINIONS BELOW

The Order and Judgment of the Tenth Circuit Court of Appeals, entered August 11, 2000, is not published in the Federal Reporter, but is published at 2000 WL 1140256. The Order and Judgment is set forth in Appendix A at 1a. The Tenth Circuit also entered an Order requiring Respondents to respond to Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* on August 29, 2000. This unpublished Order is set forth in Appendix B at 10a. The Tenth Circuit also entered an Order denying Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* on October 12, 2000. This unpublished Order is set forth in Appendix F at 67a.

The trial court entered three Orders granting summary judgment on Petitioner's claims, on March 31, 1998, March 12, 1999, and May 12, 1999. These unpublished Orders are set forth in Appendix E at 61a, Appendix D at 15a, and Appendix C at 12a, respectively.

JURISDICTION

The Order and Judgment of the Tenth Circuit Court of Appeals in this case was entered on August 11, 2000. (App. A at 1a.) The appellate court's denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc* was entered on October 12, 2000. (App. F at 67a.) The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106. Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c), this Petition is timely if filed within ninety (90) days of the denial of Petitioner's Petition for Rehearing and Suggestion of Rehearing *En Banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

* * * * * * * * * * *

U.S. Const. amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

* * * * * * * * * * *

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * * * * * * * * * *

STATEMENT OF THE CASE

In this civil action, Petitioner Ben Garrison sued Respondents, law enforcement officers employed by the City of Albuquerque and the County of Bernalillo, alleging that Respondents violated the Fourth Amendment when they shot and killed Petitioner's father, seized and evicted his mother, and searched his parents' home in the course of executing a search warrant at the house next door. Petitioner also alleged numerous violations of state tort law based on these actions. Jurisdiction in the United States District Court for the District of New Mexico was based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331, 1343, and 1367.

The United States District Court for the District of New Mexico entered three (3) Orders addressing Respondents' many motions to dismiss and for summary judgment. On March 31, 1998, the trial court granted the City Respondents summary judgment on Petitioner's supervisory liability claims. (App. E at 61a.) On March 12, 1999, the trial court granted the City Respondents summary judgment on all of Petitioner's remaining claims, and granted the County Respondents summary judgment on Petitioner's claims under 42 U.S.C. § 1983. (App. D at 15a.) Finally, on May 12, 1999, the trial court granted the County Respondents summary judgment on Petitioner's state law claims, and dismissed the case. (App. C at 12a.) Petitioner timely appealed to the United States Court of Appeals for the Tenth Circuit, and the appellate court affirmed the trial court's rulings by Order and Judgment filed August 11, 2000. (App. A at 1a.) Petitioner filed a Petition for Rehearing and Suggestion of Rehearing *En Banc*, (App. G at 70a), and although the appellate court required Respondents to answer this Petition, the court nevertheless denied the Petition on October 12, 2000. (App. F at 67a.)

The disputed facts of the case, viewed in the light most favorable to Petitioner, are as follows.[1] In the dark of the early, winter morning of December 16, 1996, Respondents executed a search warrant at 2615 Quincy, in Albuquerque, New Mexico. The warrant authorized a search of the premises and of certain named individuals suspected of counterfeiting documents. Ralph and Molly Garrison owned 2615 Quincy and resided next door. They rented 2615 Quincy to tenants. Neither the Garrisons nor their residence were subjects of the warrant. The Garrisons were visibly elderly and infirm.

On the morning of December 16, the Garrisons were awakened by what they believed to be an attack by thugs at their rental property. Respondents, officers of the Albuquerque Police Department and the Bernalillo County Sheriff's Department, were using flash/bang devices, ramming tools, and 12-gauge shotgun "shok lock" rounds to enter 2615 Quincy, as a helicopter roared overhead. The clamor caused Mr. Garrison to fear for the safety of himself, his wife, his property, and his tenants. He went out his back door to investigate. Respondents shined lights in his face, and several officers simultaneously shouted "police" and "sheriff," and commanded him to return inside. He visibly

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[1] Throughout Petitioner's appeal, Respondents have protested that Petitioner's factual allegations are unsupported and "slanted." However, Petitioner has consistently cited to those portions of the record supporting his allegations, (see, e.g., App. G at 78a-81a), and Petitioner is entitled to have the record viewed in the light most favorable to him. See, e.g., McNair v. Coffey, — F.3d —, No. 00-1139, 2000 WL 1801253, at *1 (7th Cir. Dec. 8, 2000) (Easterbrook, J.). Respondents can of course raise any genuine, material factual disputes as a defense, but should do so to a jury, not to the trial and appellate courts.

could not understand what Respondents were saying, and remained outside until Respondent Little became "mad" and shouted at him to go back inside. Respondent Little acknowledged that Mr. Garrison appeared to be responding to the sound of the officers' voices without understanding.

Respondents Little, Monteith, and Terry knew that Mr. Garrison did not realize they were officers, and thought he might return outside armed. Indeed, Respondent Little specifically said to Respondents Monteith and Terry, "watch this guy come out with a gun now." Nevertheless, these Respondents neither took advantage of copious available cover, nor warned other officers to do so. Further, they made no attempt to have an available officer approach Mr. Garrison in an audible and intelligible manner, *e.g.*, by knocking on his front door or using a public address system, to explain to him that they were police officers.

Meanwhile, Mr. Garrison called "911." Respondent Duran took Mr. Garrison's call. Mr. Garrison gave his address, and said he thought armed robbers were breaking into his rental property next door. Respondent Duran knew that the people breaking in were officers. He also knew that Mr. Garrison did *not* know. However, Respondent Duran did not tell Mr. Garrison this critical fact, even after Mr. Garrison told Respondent Duran that he was going back outside with a gun to shoot the 'robbers.' Instead, Respondent Duran told Mr. Garrison to take the telephone with him, too. Respondent Duran made no attempt to alert his fellow officers regarding the situation.

From ninety (90) seconds to several minutes after his first encounter with Respondents, Mr. Garrison returned to his back door, with his gun in one hand and his telephone in the other. He raised the gun, although he could see only

"partial shapes." Respondents Terry, Little, and Monteith, shouting "drop the gun," shot Mr. Garrison, inflicting the wounds of which he would soon die.

The County Respondents entered the Garrison residence, and found Mr. Garrison lying in the doorway. Even though Mr. Garrison was under the constant surveillance of several officers, lying on his back gurgling but not moving, missing a large part of his wrist, and several feet away from any weapon, Respondents handcuffed him. Respondents then searched the Garrison home, including a medicine cabinet and bedroom drawers. Respondents also followed Mrs. Garrison around her home, watched her use the toilet, and refused to tell her what had happened to her husband. Respondents later had Petitioner remove Mrs. Garrison from her home to ease their investigation of the shooting. Mrs. Garrison never saw her husband alive again.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE ANALYSES FOR QUALIFIED IMMUNITY AND EXCESSIVE FORCE MERGE, AS FIVE CIRCUITS HAVE FOUND, BUT AS SIX CIRCUITS HAVE REJECTED, AND THE JURY SHOULD RESOLVE THIS MERGED INQUIRY.

Petitioner alleged that Respondents used excessive force in shooting and killing Mr. Garrison, in violation of the Fourth Amendment to the United States Constitution. Petitioner's appeal of the summary judgment against him on these claims raised an important federal question about the scope of qualified immunity in excessive force cases. Specifically, Petitioner contended that the analyses for qualified immunity and excessive force merge, as five circuits

have found but as six have rejected, and that the jury should generally resolve this merged inquiry. See McNair v. Coffey, — F.3d —, No. 00-1139, 2000 1801253, at *2 (7th Cir. Dec. 8, 2000) (Easterbrook, J.) (collecting cases in favor of and against merger of inquiry). This Court has already granted certiorari twice in connection with this significant question. See Katz v. United States, 194 F.3d 962 (9th Cir. 1999), cert. granted sub nom. Saucier v. Katz, — U.S. —, 121 S. Ct. 480 (Nov. 13, 2000); Snyder v. Trepagnier, 142 F.3d 791 (5th Cir. 1998), cert. granted, 525 U.S. 1098 (1999), cert. dismissed, 526 U.S. 1083 (1999).

Ordinarily, qualified immunity is "a powerful defense." Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991), superseded on other grounds by Graham v. Connor, 490 U.S. 386 (1989). However, the defense of qualified immunity should be of limited significance in excessive force cases, because police use of excessive force necessarily violates a clearly established constitutional right.

> Uncertainty about the legal standard [governing Fourth Amendment excessive force claims] ended . . . with the Supreme Court's opinion in Graham . . . . Graham makes the norm as clear as the judiciary can achieve, more specific than rules of tort law under which juries regularly award large damages against surgeons and auto manufacturers.

McNair, 2000 WL 1801253, at *2. Further,

> [b]oth the second prong of the qualified immunity defense (whether a reasonable officer could have believed his conduct was lawful), and the merits of an excessive force

> claim focus on the objective reasonableness of the officer's conduct. . . . Because of this parity, . . . the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim.

Katz, 194 F.3d at 968; Robinson v. Solano County, 218 F.3d 1030, 1037, rehearing en banc granted, 229 F.3d 931 (9th Cir. 2000); Quezada, 944 F.2d at 718; see also McNair, 2000 WL 1801253, at *2 (Trial court erred in setting aside jury verdict in plaintiffs' favor based on qualified immunity because "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful."); Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991) (Trial court erred in instructing jury separately on excessive force and qualified immunity because "the determination of liability and the availability of qualified immunity depend on the same findings."); but see Snyder, 142 F.3d at 800 ("There is no inherent conflict between a finding of excessive force and a finding of qualified immunity."). Thus, there should be only one, "merged" inquiry regarding excessive force, *i.e.*, whether the force used was objectively reasonable under all of the surrounding circumstances. The Court has apparently granted certiorari on this question in the Katz case, as it previously did in the Snyder case.[2]

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[2] The Court does not appear to have decided this issue. See, e.g., Graham, 490 U.S. at 399 n.12 ("[T]he officer's objective good faith - that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment - may be

Should the Court hold that the qualified immunity and excessive force inquiries merge, this holding will inevitably and immediately raise the question centrally at issue in this case. Specifically, once the merged inquiry is recognized, whether the judge or the jury should resolve the merged inquiry must also be addressed. The Tenth Circuit in this matter departed from the Seventh Circuit in McNair and the Ninth Circuit in Katz in answering this question. Compare McNair, 2000 WL 1801253, at *2-*3 (jury should decide objective reasonableness in factually close cases), and Katz, 194 F.3d at 970 n. 5 ("The question of the reasonableness of force is usually a question of fact for the jury. However, on summary judgment, the court may make a determination as to reasonableness when, viewing the evidence in the light most favorable to the plaintiff, the evidence compels the conclusion that the officer's use of force was reasonable."), with Appendix A at 7a ("We agree that [Respondents] were acting objectively reasonable [sic] in light of surrounding facts and circumstances.").

The divergence of the Seventh, Ninth, and Tenth Circuits stems from the distinct lines of authority governing qualified immunity and excessive force claims. Generally, entitlement to qualified immunity is a legal question for the court to decide. Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991); see also Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (allowing interlocutory appeal of "the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law"). However, whether force is "excessive" or "objectively reasonable" is almost always a

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relevant to the availability of the qualified immunity defense . . . . [H]owever, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment.").

fact issue for the jury to decide. Katz, 194 F.3d at 970 n.5; Quezada, 944 F.2d at 715. These two lines of authority come into conflict when the qualified immunity and excessive force analyses merge.[3]

The objective reasonableness of a particular use of force is an exceptionally fact-intensive inquiry that "requires careful attention to the facts and circumstances of each particular case." Graham, 490 U.S. at 396. As such, this inquiry is more appropriately left to the jury. Otherwise, defendants as well as plaintiffs would be exposed to more frequent judgments as a matter of law, because the court should remove from the jury not only those cases in which it believes that the force used *was* objectively reasonable, but also those cases in which it believes that the force was *not*. Such a trend is inappropriate to an inquiry so dependent on the myriad, often subtle details of context.

Of course, this Court could rule that, on a motion for qualified immunity, the trial court must *only* decide either (i) that an officer's actions were reasonable, or (ii) that a reasonable juror could find that the officer's actions were unreasonable. This appears to be the current practice in many Circuits, where courts commonly grant summary judgment in defendants' favor on motions for qualified immunity in excessive force cases, but virtually never grant summary

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[3] Respondents have argued that Federal Rule of Civil Procedure 56 resolves this issue, because under Rule 56, the court decides questions of law, and the jury decides questions of fact. As discussed in this section, however, whether an officer's use of force was objectively reasonable can be characterized either as a question of law, regarding qualified immunity, or as a question of fact, regarding substantive liability. Thus, Rule 56 does not resolve this issue.

judgment in plaintiffs' favor on such motions. However, courts engaging in this practice employ a quintessential double standard, treating the very same question as one of law for the court if finding for the officer, but as one of fact for the jury if finding for the plaintiff. The effect of this practice is to retain the defendant officer's right to a jury trial, but to deprive the plaintiff of that constitutional right. U.S. Const. amend. VII.

Judge Easterbrook, writing for the United States Court of Appeals for the Seventh Circuit, regarded this problem from a slightly different perspective, and observed,

> [t]o say that a public official is not exposed to damages even when all legal issues were authoritatively resolved before the conduct occurred would be to make a substantial change in the scope of liability under 42 U.S.C. § 1983. [The] argument for immunity in factually (as opposed to legally) close cases is fundamentally a request to increase the plaintiff's burden of proof–to insist that the plaintiff show a violation not by a preponderance of the evidence (where the plaintiff can win a close case) but by clear and convincing evidence (where all close cases go to the defendant), perhaps even proof beyond a reasonable doubt.

McNair, 2000 WL 1801253, at *3 (citations omitted). However, the preponderance standard of proof "applies to civil claims of all sorts . . . [and s]hould not be changed covertly, through an immunity defense that imposes a heightened standard of proof." Id.

Also, Judge Easterbrook admonished,

> [l]et us never forget that immunity in § 1983 cases is a judicial invention. Congress provided for liability in absolute terms. . . . The Supreme Court has justified immunity doctrines as approximating of the scope of public-official liability that prevailed when § 1983 was enacted. Fair enough in many parts of the law, but not when dealing with the [F]ourth [A]mendment. Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of. . . . All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability.

Id. (citations omitted). Thus, in the Fourth Amendment context, "a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical." Id. at *4. In short, practically, textually, and historically, the jury and not the judge should determine whether an officer's use of force is objectively unreasonable within the meaning of the Fourth Amendment.

If the qualified immunity and excessive force analyses merge, who should determine the ultimate inquiry of whether the defendant officer acted reasonably is an important question of federal law on which the appellate courts have divided, and which demands a clear, reasoned, and definitive resolution by this Court. See S. Ct. R. 10(a), (c); McNair, 2000 WL

1801253, at *2-*4; Robinson, 218 F.3d at 1037; Katz, 194 F.3d at 962; Snyder, 142 F.3d at 791; (App. A at 7a). This question would affect the course of almost every excessive force case. Specifically, in virtually all excessive force cases, the defendant officer raises the defense of qualified immunity. If he does so, and if the qualified immunity and excessive force analyses merge, then the trial judge will be forced to determine whether to decide for him or herself if the officer's actions were unreasonable, or rather, to leave the ultimate determination to the jury. Trial courts presently have only oblique guidance on this significant recurring issue. The Court should resolve the question conclusively, and hold that trial courts are simply to determine whether there is sufficient evidence of objective unreasonableness to go to a jury.

The Court should grant Petitioner's Petition for Writ of Certiorari, and reverse the Tenth Circuit's affirmance of summary judgment in Respondents' favor on Petitioner's excessive force claims on this basis. The Tenth Circuit offered no reasoning on this issue in its Order and Judgment. (See generally App. A at 7a-8a.) It did, however, decide the issue against Petitioner. Specifically, the Tenth Circuit restricted neither its own nor the trial court's review of Petitioner's excessive force claims to bare legal sufficiency under Federal Rule of Civil Procedure 56. (Id.) Rather, the appellate court improperly affirmed the trial court's decision on the ultimate inquiry, *i.e.*, whether the force used was in fact objectively unreasonable. (See generally App. A at 6a-9a.) In so doing, the appellate court necessarily rejected Petitioner's argument that the jury, rather than the court, should have decided this inquiry.

Had the appellate court properly restricted the scope of its own and the trial court's review, Petitioner's excessive force claims must have been allowed to proceed. The Tenth

Circuit's excessive force cases, derived from the principles of Graham v. Connor, 490 U.S. 386 (1989), clearly permit a finding of objective unreasonableness where a law enforcement officer recklessly generates the need to use deadly force against a citizen. See, e.g., Allen v. City of Muskogee, 119 F.3d 837 (10th Cir. 1997), cert. denied, 522 U.S. 1148 (1998) (there were genuine issues for trial on plaintiff's claims that officers used excessive force by recklessly precipitating incident where decedent aimed gun at officers, and officers shot decedent); Myers v. Oklahoma County Board of County Commissioners, 80 F.3d 421, 424-25 (10th Cir. 1996) (same); Sevier v. City of Lawrence, 60 F.3d 695, 700-01 (10th Cir. 1995) (trial court properly denied officers qualified immunity where officers approached decedent knowing he was armed and distraught, decedent lunged at an officer with knife, and officers shot and killed him). Likewise, in the present matter, a reasonable factfinder could have concluded that Respondents recklessly precipitated their fatal encounter with Mr. Garrison, and that their shooting of Mr. Garrison was therefore objectively unreasonable.

In the course of Petitioner's appeal, Respondents posited several objections to Petitioner's qualified immunity argument. For example, Respondents claimed that, if Petitioner is correct, qualified immunity would never be available as a defense. However, this dire prediction is plainly false. Under Federal Rule of Civil Procedure 56, the court must always inquire whether, construing the facts and inferences in the plaintiff's favor, a reasonable factfinder could find for the plaintiff. Fed. R. Civ. P. 56; McNair, 2000 WL 1801253, at *3; Katz, 194 F.3d at 970 n.5. Thus, whenever a reasonable factfinder could only conclude that an officer's use of force was objectively reasonable, the officer would be entitled to summary judgment, both substantively

and on the basis of qualified immunity. McNair, 2000 WL 1801253, at *3 (officer entitled to qualified immunity if court determines that "circumstances would not have alerted a reasonable officer that his acts *could* be deemed an application of excessive force") (emphasis added). Petitioner does not argue that either defense is eliminated. Rather, Petitioner simply observes that, in excessive force cases, the inquiries for liability and for qualified immunity are the same, and, unless there are no genuine issues of material fact, should be decided by the jury. Cf. Johnson v. Jones, 515 U.S. 304, 318 (1995) (public official may be forced to go to trial rather than pursue interlocutory appeal where trial court denied qualified immunity based on genuine issues of material fact).

Respondents also claimed that this Court rejected Petitioner's argument in Anderson v. Creighton, 484 U.S. 635 (1987). Respondents are mistaken, if only because Anderson involved a warrantless search, and not excessive force. Id. at 637. In fact, the Anderson reasoning indirectly supports Petitioner's argument. In Anderson, the plaintiffs argued that qualified immunity is inapplicable in *all* Fourth Amendment cases because the Fourth Amendment prohibits "unreasonable" searches and seizures, and qualified immunity does not protect "unreasonable" conduct. Id. at 643-44. In rejecting this argument, the Anderson Court observed that "unreasonable" in the text of the Fourth Amendment is not a legal standard, but a term of art, simply signifying "unlawful" or "undue." Id. This is in marked distinction to excessive force cases specifically, in which the actual legal standard is one of "objective unreasonableness"– the very same standard as for qualified immunity.[4] For all of these reasons, the trial

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[4] The Fifth Circuit's analysis in Snyder is similarly mistaken. In Snyder, the Fifth Circuit reasoned that a jury could

court's decision that Respondents were entitled to qualified immunity for their use of force against Mr. Garrison should have been left to the jury, and the appellate court erred in affirming the trial court's usurpation of this decision. This Court should grant this Petition, remand this matter, and restrict the Tenth Circuit's and the trial court's review of Petitioner's excessive force claims to legal sufficiency only, leaving the ultimate, merged inquiry of objective reasonableness to the jury.

II. THE COURT OF APPEALS MAY NOT DEFER TO THE TRIAL COURT'S DETERMINATION OF STATE LAW UNDER SALVE REGINA COLLEGE V. RUSSELL, 499 U.S. 225 (1991).

The federal courts have "a virtually unflagging obligation to exercise the jurisdiction given them." Newland v. First Nat'l Bank in Goodland, 82 F.3d 338, 341 n.2 (10th Cir. 1996) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).) Thus, an appellate court must consider questions placed before it, provided they are properly preserved and raised on appeal.

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find that an officer used excessive force, but was entitled to qualified immunity, because a jury could find that the force used was *actually* excessive, but did not *appear* to be excessive from a reasonable officer's perspective. 142 F.3d at 800. In fact, however, the standard for both qualified immunity and excessive force is whether the force appeared to be objectively reasonable from the officer's perspective at the time. Wilson v. Layne, 526 U.S. 603, 614 (1999) (qualified immunity); Graham, 490 U.S. at 396 (excessive force). Thus, notwithstanding the Snyder court's conclusion to the contrary, the standards for qualified immunity and excessive force are the same.

Cf., e.g., Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999) (appellate court not obliged to review issue not preserved below). This includes an obligation to conduct a plenary review of questions involving state law. Salve Regina College v. Russell, 499 U.S. 225, 231-40 (1991). In Salve Regina College, this Court overruled the then-prevailing view of the federal appellate courts, holding that these courts should not defer to the lower courts' interpretation of "local" state law, but should review state law questions *de novo*. Id.; Leavitt v. Jane L., 518 U.S. 137, 145 (1996).

In the present matter, Petitioner raised on appeal several properly preserved, substantial arguments that the Tenth Circuit simply refused to review. For example, Petitioner argued that Respondents used excessive force in handcuffing Mr. Garrison. Courts have determined that "no reasonable officer could believe that the abusive application of handcuffs was constitutional." Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); Martin v. Heideman, 106 F.3d 1308, 1311-12 (6th Cir. 1997). In the present matter, Petitioner observed that Respondents' handcuffing of Mr. Garrison was both futile and cruel. Mr. Garrison, whose wrist had just been shot half away, was peculiarly unable to reach or manipulate a weapon, and obviously vulnerable to severe pain from pressure applied to his wrist. The Tenth Circuit, however, did not even acknowledge this claim.

The Tenth Circuit also ignored Petitioner's substantial claims against Respondent Duran, the 911 operator. Respondent Duran consciously withheld from Mr. Garrison the vital information that the persons Mr. Garrison believed to be armed robbers were in fact police officers. He withheld this information even when Mr. Garrison stated he was going to go back outside with a gun to shoot the 'robbers.' Respondent Duran's behavior was quintessentially reckless,

i.e., involving the conscious disregard of a known risk of Mr. Garrison's or a police officer's death. See, e.g., Uhlrig v. Harder, 64 F.3d 567, 573 n.8 (10th Cir. 1995). These profoundly disturbing acts and omissions formed the basis of Petitioner's section 1983 and state tort claims against Respondent Duran. Nevertheless, the Tenth Circuit did not even mention these claims, much less justify the trial court's summary dismissal of them.

Most egregiously, the Tenth Circuit explicitly refused to review the trial court's dismissal of Petitioner's state tort claims, with the bare statement,

> [a]s to Garrison's state claims, we are disinclined to disturb the district court's understanding of local New Mexico law or his [sic] application thereof to the present facts.

(App. A at 9a.) In other words, the appellate court deferred to the trial court's purported expertise in "local New Mexico law." (Id.) However, this Court unequivocally prohibited such deference in Salve Regina College.[5] 499 U.S. at 231-40.

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[5] Further, the appellate court had no need to defer to the trial court's interpretation of state law. To the extent that the appellate court found the state law questions novel or difficult, the court was able to certify these questions to the state's highest court for resolution. See N.M. R. App. P. 12-607(A) (providing for certification of questions to New Mexico Supreme Court). In fact, Petitioner actually moved to certify to the New Mexico Supreme Court the question whether Respondent Duran was acting as a law enforcement officer within the meaning of the New Mexico Tort Claims Act, both in the trial court and in the court of appeals. Neither court chose to avail itself of the certification procedure, although it "in the long run save[s] time, energy, and resources and

Because the Tenth Circuit blatantly violated this Court's clear mandate in deferring to the trial court's interpretation of state law, the Court should grant this Petition, or, in the alternative, vacate the Tenth Circuit's decision in light of Salve Regina College, and remand Petitioner's state law claims to the Tenth Circuit for *de novo* review.

The City Respondents may argue that the Tenth Circuit did not defer to the trial court's interpretation of state law, but rather adopted the interpretation as its own, relying on the observation in Salve Regina College that, "[i]f the court of appeals finds that the district court's analytical sophistication and research have exhausted the state-law inquiry, little more need be said in the appellate opinion." 499 U.S. at 233. However, in the present matter, the Tenth Circuit did not approve and adopt as its own the trial court's reasoning, which in any event was not "exhaustive" as to the many state law issues. (See App. A at 9a; App. D at 50a-58a.) Rather, the Tenth Circuit deferred to "the *district court's understanding* of local New Mexico law." (App. A at 9a (emphasis added).) This deference is precisely what Salve Regina College has forbidden, and it is no less important for this Court to hold the Tenth Circuit to the Salve Regina College decision because the Tenth Circuit phrased its rejection of the decision briefly and none too clearly.

In short, the Tenth Circuit breached its duty to review several properly preserved issues of great significance in its apparent rush to reject Petitioner's appeal at all costs, in direct contravention of this Court's precedent. See S. Ct. R. 10(c). The Court should therefore either grant Petitioner's Petition

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helps build a cooperative judicial federalism." Salve Regina College, 499 U.S. at 237 n.4.

for Writ of Certiorari or vacate the Tenth Circuit's decision in light of Salve Regina College, and remand this case to the Tenth Circuit, requiring that court to decide all questions properly before it.

CONCLUSION

For the reasons stated above, Petitioner Ben Garrison, as Personal Representative of the Estates of Ralph and Molly Garrison, requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 11, 2000]

No. 99-2193
(D.C. No. CIV-96-1801-LH/DJS)
(District of New Mexico)

BEN GARRISON, as personal representative of the Estates of Ralph Garrison deceased and Molly Garrison, for Molly Garrison individually, *Plaintiff-Appellant,*	)
v.	)
JOE POLISAR, Albuquerque Police Chief, JOE BOWDICH, Bernalillo County Sheriff, in their official and individual capacities; HOWARD NEAL TERRY, ERIK LITTLE, JAMES MONTEITH, Sheriff's Officers, in their individual capacities; LT. RUBEN DAVALOS, LT. J. R. DEBUCK, LT. JUDD SCHAFFER, SGT. KEVIN McCABE, Albuquerque Police Supervisors;	)

STEVE RODRIGUEZ, Acting Sgt.;)
CHARLES LOPEZ, Albuquerque)
Police Officer; CHRISTINA BACA,)
MARY PATRICK, MARY MARQUEZ,)
GILBERT DURAN, Albuquerque)
Police Dispatchers/Operators;)
SGT. KENNETH BOZELL,)
LT. LINTHICUM, CAPTAIN)
STEBLETON, Bernalillo County)
Sheriff's Supervisors; JAMES)
GONZALES, PATRICK LUCERO,)
FERMIN ORTEGA, GREG)
REESE, DAVID ARCHIBEQUE,)
DEPUTY VAN ELDREDGE,)
Bernalillo County Sheriff's Officers,)
Defendants-Appellees.)
)

ORDER AND JUDGMENT*

Before **TACHA**, Circuit **Judge, McWILLIAMS**, Senior Circuit Judge, and **MAGILL****, Senior Circuit Judge.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

On October 3, 1997, Molly Garrison, individually and as the personal representative of the estate of her deceased husband, Ralph Garrison, filed a second amended complaint in the United States District Court for the District of New Mexico alleging a violation of civil rights under 42 U.S.C. § 1983, asserting several state tort claims and naming as defendants 12 members of the Albuquerque Police Department and 12 members of the Bernalillo County Sheriff's office. (The City of Albuquerque and Bernalillo County were not named defendants in the second amended complaint.[1]) The basis for the action was the shooting and killing of Molly Garrison's husband, Ralph Garrison, during a search of premises in Albuquerque which were located next door to the residence where Molly and Ralph Garrison resided. In her amended complaint Molly Garrison set forth seven claims for relief: (1) unreasonable search in violation of the Fourth and Fourteenth Amendments; (2) unreasonable seizure in violation of the Fourth and Fourteenth Amendments; (3) supervisory and official capacity liability for violation of constitutional rights; (4) conspiring to violate civil rights under 42 U.S.C. § 1983; (5) wrongful death caused by law enforcement officers' assault and battery; (6) false imprisonment by law enforcement officers; and (7) negligence of law enforcement officers causing enumerated torts.[2] After

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[1] The original complaint is not a part of the record on appeal. Nonetheless, it would appear that the City of Albuquerque and Bernalillo County were named as defendants, along with individual officers of each, in the original complaint.

[2] During the course of the proceedings in the district court Molly Garrison died, and the Garrisons' son, Ben Garrison, was substituted as the personal representative of both Ralph and Molly

discovery, all defendants filed motions for summary judgment. By unpublished orders, the district court on March 31, 1998, granted some of those motions and thereafter on March 12, 1999, granted additional motions for summary judgment. Finally, on May 12, 1999, the district court granted all pending motions for summary judgment and entered an order dismissing all of Garrison's claims as to all 24 defendants. Garrison appeals. We affirm.

Some limited background facts become necessary. On December 16, 1996, pursuant to a search warrant, there was a joint search at about 6:00 a.m. of the premises at 2615 Quincy, Northeast in Albuquerque, New Mexico, carried out by the Albuquerque Police Department and the Bernalillo County Sheriff's Office. Molly and Ralph Garrison resided next door at 2619 Quincy and owned the 2615 premises, which they had rented to another. During the course of the search, Ralph Garrison, age 69, exited his back door and confronted certain of the officers who were conducting the search. The officers were in SWAT uniforms and told Garrison who they were and what they were doing. Garrison was ordered to go back into his house which he did, apparently rather reluctantly. Inside, Garrison called 911 and told the operator his story. The 911 conversation was tape recorded and is a part of the record on appeal. The conversation ended when Garrison said he was going out to "shoot the sons-of-bitches." Garrison then began exiting his back door, this time with a weapon in his hand, and there was a second confrontation between Ralph Garrison and certain of the defendants wherein certain of the defendants shot Garrison

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Garrison's estates.

as he was aiming his weapon at fellow officers. After the shooting, Ralph Garrison fell back into his home, and certain of the defendants followed him into the house, handcuffed him and made a search of the premises in which they allegedly "seized" Molly Garrison. An ambulance took Ralph Garrison to a hospital and he died shortly thereafter. Molly Garrison was not in good health and Ben Garrison was called by one of the defendants and he came and took charge of his mother.

As indicated, the district court by three separate orders granted the defendants' motions for summary judgment and entered judgment in favor of all defendants on all claims. The orders of the district court were in considerable detail. In sum, the district court held that on the record before it Officer Terry of the Albuquerque Police Department had not used excessive force in shooting Ralph Garrison and that his actions, under the described circumstances were "objectively reasonable" and that there was no violation of any constitutional right; that the ensuing search of the Garrison residence was a legitimate "protective sweep;" and that any "detention" of Molly Garrison culminating in placing her in the care of her son was proper under "the Fourth Amendment's caretaking function." For similar reasons, the district court concluded that the state claims asserted in the complaint were without merit.

On appeal, counsel's main argument is that the district court usurped the function of a jury, and that all of the various issues should have been submitted to a jury and not decided on summary judgment. In thus arguing, counsel necessarily relies on the depositional testimony of the various

defendants, since Ralph Garrison was dead and could not give his version of events.

As concerns Garrison's § 1983 claim, the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 395-7 (1989) spoke as follows:

> Today we make explicit what was implicit in *Garner's* [*Tennessee v. Garner*, 471 U.S. 1 (1985)] analysis, and hold that *all* claims that the law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.
>
> * * * * *
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

In line with *Graham*, in *Allen v. Muskogee, Okl.*, 119 F.3d 837, 840 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148 (1998), we spoke as follows:

> We analyze a § 1983 claim of excessive force by determining whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances.
>
> * * * * *
>
> The excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force. Of course, the use of force must be judged from the perspective of a reasonable officer "on the scene," who is "often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." However, as we stated in *Sevier*: "[t]he reasonableness of Defendants' actions depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." We will thus consider an officer's conduct prior to the suspect's threat of force if the conduct is "immediately connected" to the suspect's threat of force (citations omitted).

We agree that Officer Terry and the two other officers who fired at Ralph Garrison when he was aiming his weapon at other officers were acting "objectively reasonable in the light of surrounding facts and circumstances." Counsel argues

that under *Allen*, which cited with approval *Sevier v. City of Lawrence, Kan.*, 60 F.3d 695, 699 (10th Cir. 1995), the defendants' "own reckless or deliberate conduct during the seizure unreasonably created the need to use such force."[3] We see no "reckless or deliberate" conduct by any of the defendants which in any way created "the need to use such force." In this regard, counsel stresses the fact that when Ralph Garrison returned to his residence after his first confrontation with the officers, one of the officers remarked that he hoped Garrison would not return with a gun. Counsel suggests that such utterance somehow proves that the officers' conduct somehow precipitated the second confrontation wherein the shooting occurred. We fail to see the connection. The central fact is that when the fatal shots were fired, Ralph Garrison was aiming his gun at other officers at the scene. Considering the circumstances, we agree that Officer Terry was acting "objectively reasonable." He did not have to wait for Garrison to fire the first shot.

After being shot, the officers followed Ralph Garrison into the house where they made a "protective sweep" for their own safety. *Maryland v. Buie*, 494 U.S. 325 (1990); *United States v. Soria*, 959 F.2d 855 (10th Cir.), *cert. denied*, 506 U.S. 882 (1992). Such, in our view, was also "objectively reasonable." Nor do we perceive any unlawful "detention" of Molly Garrison. She was obviously infirm, and the officers, in a sense, took care of her until they turned her over to her son. Certainly there was no "excessive force" by any of the

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[3] In *Sevier*, footnote 7, we said that "negligent actions precipitating a confrontation would not, of course, be actionable under § 1983."

officers. *See United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993), where we, citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), observed that police officers are expected to exercise "community caretaking functions" which are independent of any criminal investigation.

As to Garrison's state claims, we are disinclined to disturb the district court's understanding of local New Mexico law or his application thereof to the present facts.

Judgment affirmed.

Entered for the court,

Robert H. McWilliams
Senior Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 29, 2000]

No. 99-2193

BEN GARRISON, as personal representative of the Estates of Ralph Garrison deceased and Molly Garrison, for Molly Garrison individually, *Plaintiff-Appellant,*	)
v.	)
JOE POLISAR, Albuquerque Police Chief, JOE BOWDICH, Bernalillo County Sheriff, in their official and individual capacities; HOWARD NEAL TERRY, ERIK LITTLE, JAMES MONTEITH, Sheriff's Officers, in their individual capacities; LT. RUBEN DAVALOS, LT. J. R. DEBUCK, LT. JUDD SCHAFFER, SGT. KEVIN McCABE, Albuquerque Police Supervisors; STEVE RODRIGUEZ, Acting Sgt.; CHARLES LOPEZ, Albuquerque Police Officer; CHRISTINA BACA,	)

MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, Albuquerque Police Dispatchers/Operators; SGT. KENNETH BOZELL, LT. LINTHICUM, CAPTAIN STEBLETON, Bernalillo County Sheriff's Supervisors; JAMES GONZALES, PATRICK LUCERO, FERMIN ORTEGA, GREG REESE, DAVID ARCHIBEQUE, DEPUTY VAN ELDREDGE, Bernalillo County Sheriff's Officers,

Defendants-Appellees.

ORDER

Before **TACHA**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **MAGILL***, Senior Circuit Judge.

This matter is before the court on appellant's petition for rehearing en banc. Appellees shall file a response to the petition on or before September 13, 2000.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/_____
Deputy Clerk

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* Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eight Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed May 12, 1999]

No. CIV 96-1801 LH/DJS

BEN GARRISON, individually and as the personal representative of the ESTATES OF RALPH GARRISON and MOLLY GARRISON, deceased,
Plaintiff,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON,

DEPUTY ERIK LITTLE, DEPUTY JAMES MONTEITH, DEPUTY JAMES GONZALES, DEPUTY PATRICK LUCERO, DEPUTY FERMIN ORTEGA, DEPUTY GREG REESE, DEPUTY DAVID ARCHIBEQUE, and DEPUTY VAN ELDREDGE in their individual and official capacities,

Defendants.

ORDER

THIS MATTER comes before the Court on the County Defendants' Motion to Dismiss State Law Claims Against the County Defendants Contained in Counts V, VI, and VII of the Second Amended Complaint (Docket No. 143), filed May 7, 1999. The Court, having considered the Motion, the accompanying memoranda, the record in this matter, and the applicable law, and otherwise being fully advised, finds that the Motion is well taken and will be granted.

County Defendants move for dismissal of "the only claims remaining [in this suit,] the state law claims against the County defendants-that is, the false imprisonment claim against the non-supervisory County defendants. . . and the assault and battery claim asserted only against County defendants Monteith and Little." (Mem. Supp. Mot. Dismiss State Law Claims at 1-2.) In his Response, Plaintiff "incorporates the arguments he has made in opposition to dismissal of all of his claims against the City Defendants, and his constitutional claims against the County Defendants [, and] does not waive any of these arguments [or] his right to appeal

th[e] Court's rulings regarding his claims against the City and County Defendants." (Pl.'s Resp. County Defs.' Mot. Dismiss State Law Claims at 1.) Plaintiff, however, "concedes that the Court's earlier rulings on his constitutional claims against all Defendants, and his state law claims against the City Defendants, also compel the dismissal of his state law claims against the County Defendants, should the Court decline to revisit these rulings." *(Id.* at 1-2.)

There is no motion before the Court to reconsider its prior rulings in this matter and the Court declines to do so *sua sponte*. Additionally, as Plaintiff concedes all of his remaining claims, this case will be dismissed.

IT IS HEREBY ORDERED that the County Defendants' Motion to Dismiss State Law Claims Against the County Defendants Contained in Counts V, VI, and VII of the Second Amended Complaint (Docket No. 143), filed May 7, 1999, is **GRANTED**.

IT IS FURTHER ORDERED that this case is **DISMISSED**.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed March 12, 1999]

No. CIV 96-1801 LH/DJS

BEN GARRISON, individually and as the personal representative of the ESTATES OF RALPH GARRISON and MOLLY GARRISON, deceased,
Plaintiff,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON,

DEPUTY ERIK LITTLE, DEPUTY)
JAMES MONTEITH, DEPUTY JAMES)
GONZALES, DEPUTY PATRICK)
LUCERO, DEPUTY FERMIN ORTEGA,)
DEPUTY GREG REESE, DEPUTY)
DAVID ARCHIBEQUE, and DEPUTY)
VAN ELDREDGE in their individual and)
official capacities,)
Defendants.)
)

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (City's Motion No. III) (Docket No. 30), filed July 17, 1997; Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (County's Motion) (Docket No. 69), filed October 24, 1997; City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (City's Motion No. VI) (Docket No. 74), filed November 5, 1997; City Defendants' Motion for Partial Summary Judgment No. VII: Qualified Immunity for Defendant Officers Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (City's Motion No. VII) (Docket No. 85), filed January 8, 1998; and County Defendants' Supplemental Motion for Summary Judgment on Plaintiffs' [sic] Civil

Rights Claims (County's Supplemental Motion) (Docket No. 108), filed August 5, 1998. The Court, having considered the pleadings submitted by the parties, including cross-referenced statements of undisputed material facts and affidavits submitted with previously ruled upon motions and supplemental pleadings, the oral argument of counsel at hearing, and the applicable law, and otherwise being fully advised, finds that City's Motion No. III is well taken and will be **granted**, County's Motion is well taken in part and will be **granted in part**, City's Motion No. VI is well taken in part and will be **granted in part**, City's Motion No. VII is well taken and will be **granted**, and County's Supplemental Motion is well taken and will be **granted**.

FACTUAL BACKGROUND

This suit stems from a most unfortunate event, the shooting of sixty-nine year old Ralph Garrison by members of the Albuquerque Police Department (APD) and the Bernalillo County Sheriff's Office (BCSO) at his home on December 16, 1996, while they were executing a search warrant on Mr. Garrison's adjacent rental property. Mr. Garrison subsequently died of his wounds. The relevant facts in this case have been extensively developed through affidavits and depositions.

In early December 1996, an APD investigation turned up evidence of a criminal conspiracy involving stolen and counterfeit checks, counterfeit United States currency, and other felony white-collar activity, the proceeds of which were used in part by the conspirators to supply their methamphetamine drug habits. A coconspirator told investigators that equipment used to make counterfeit

documents was kept at a residence located at 2615 Quincy N.E. Further investigation revealed that this property was *rented by certain other coconspirators* from Ralph Garrison, who resided at 2619 Quincy N.E. There was no evidence linking Mr. Garrison to the criminal activities.

A search warrant for 2615 Quincy was issued on December 13, 1996. For a variety of reasons, including the determination that detectives in the White Collar Crimes Unit were neither adequately trained nor suitably equipped to execute the warrant against the potentially armed and violent suspects expected to be present in the two "fortified"[1] structures on the property, APD's Special Weapons and Tactics (SWAT) Unit agreed to plan and carry out the operation. Execution of the warrant was tentatively scheduled for December 16, 1996, at 9:00 a.m. After reviewing relevant information regarding the suspects and surveying the subject location and adjacent neighborhood several times, including from the air in a United States Customs Service helicopter, an APD SWAT officer determined that, due to pedestrian and vehicular traffic, 6:00 a.m. would be the safest time of day to serve the warrant. He also concluded that more SWAT officers than were available to the APD SWAT Unit would be needed to safely and effectively enter the buildings on the property. Thus, the assistance of the BCSO SWAT Team was secured. After further joint planning by officers of both SWAT units, the final plan for execution of the warrant was

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[1] The property was protected by a tall fence with a locking gate, wrought iron bars on the front door and windows of the front structure, a wrought iron door on the rear structure, and a Rottweiler dog in the backyard.

approved: The search warrant was to be served at 6:00 a.m., with the APD SWAT Unit entering the main residence and the BCSO SWAT Team securing the backyard and entering the rear structure.

Members of the APD SWAT Unit, BCSO SWAT Team, APD White Collar Crimes Unit, APD Air Support Unit, and an APD Tactical Emergency Medical Support (TEMS) officer met at 3:00 a.m. on December 16, 1996, to review plans for execution of the search warrant. APD Air Support officers showed a previously videotaped forward looking infrared[2] (FLIR) aerial view of 2615 Quincy and the surrounding area. They also announced that a United States Customs Service helicopter, equipped with a FLIR video camera and a Night Sun spotlight,[3] would hover at approximately 300 feet while the warrant was being executed and illuminate the property and surrounding area after the SWAT officers made their initial entry. Information concerning the criminal case, search warrant, and suspects was also provided. No information was given about Mr. Garrison or any other neighbor, however, as surveillance had revealed no reason to conclude that they posed a threat to the officers' safety. Accordingly, the officers were instructed to treat the threat posed by neighbors as "unknown." Diagrams of the staging area and subject property and RAP sheets and photos of the suspects were passed out. Participants were

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[2] A FLIR camera allows observation of people and objects on the ground in the absence of an ambient light source.

[3] At an altitude of about 300 feet, the Night Sun produces light sufficient for a person on the ground to read a newspaper at night.

briefed on the plan and assigned their specific responsibilities, which they then rehearsed. The APD and BCSO SWAT units then conducted individual team briefings covering their assigned duties.

The duty sergeant at the North Area Command was informed shortly after 4:00 a.m. that a search warrant would be executed at 2615 Quincy N.E. at approximately 6:01 a.m. that morning. Also, the Albuquerque Fire Department (AFD)was notified and asked to have a rescue unit standing by. At 4:20 a.m., APD radio dispatch (Valley III) was told of the operation and asked to send an APD Field Investigator to the warrant site sometime after 6:10 a.m.

Shortly after 5:30 a.m., the participants met at the staging area, a parking lot located closer to the Quincy address, where they were joined by a United States Secret Service Special Agent. The APD SWAT Unit officers wore black Nomex fatigue uniforms, Nomex balaclavas, and Nomex flight gloves. A 3 ½ by 4 ½ inch APD shoulder patch was sewn on the left arm of the fatigues and a 3 ½ by 4 ½ SWAT Unit patch on the right sleeve. Both patches were centered about one inch below the shoulder. Over the tactical uniforms the officers wore bullet-resistant body armor, with a cloth silver or gold APD badge sewn on the left breast area. Additionally, all wore equipment vests, bullet-resistant helmets, and safety goggles or glasses. They also carried specialized firearms, including hand guns, shot guns, and semi-automatic rifles. The BCSO SWAT Team deputies were similarly attired and equipped.

While waiting in the parking lot, the U.S. Customs pilot informed the participants that the lights were on in the

main residence at 2615 Quincy. Several officers who conducted a drive-by confirmed this information and stated that there was activity inside the residence. At approximately 6:00 a.m. the authorities proceeded to the warrant location in several APD vehicles, including a raid truck, "pull" vehicle, SWAT Unit equipment truck, and two K-9 vehicles, the BCSO SWAT Team raid truck and CNT truck, and an unmarked car.

On arrival at approximately 6:03 a.m., a deputy sheriff used the BCSO CNT truck to breach the gate on the south side of 2615 Quincy.[4] Another officer positioned the "pull" vehicle at the southeast comer of the property, in case it was needed to remove the wrought iron door on the front building. The raid truck was parked in front of the residence and APD SWAT team officers exited and took their positions. Officer Bledsoe drove his APD K-9 truck[5] north through the alley on the west side of the property, stopping next to a three foot high cinder block wall topped by a three foot chain link fence directly behind 2619 Quincy.

The APD SWAT Team entered the main residence through the unlocked front door, without using any forced-entry tools or flash diversionary devices. The building and its

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[4] The gate's lock was protected by a metal enclosure which prevented breaching tools from quickly and effectively removing the lock.

[5] The K-9 truck was marked as a police vehicle, with overhead emergency lights, APD badges on the driver and passenger's doors, and "CAUTION POLICE DOG" written in four-inch letters on the side.

occupant were secured in short order and the White Collar Crimes detectives then conducted the search.

As the APD SWAT Unit approached the front building, the BCSO SWAT Team secured the backyard area around the rear structure and provided cover to the entry team. Deputies Little[6] and Monteith positioned themselves in front of the combination cinder block wall and chain link fence[7] that separated 2615 Quincy from 2619 Quincy. As the Customs helicopter began to lower its hover to 300 feet, the County SWAT Team announced itself at the wrought iron door of the rear structure. There being no response, two deputies unsuccessfully attempted entry with a hand-held ram, halligan tool, and pry bar[8] while others loudly shouted, "Sheriff's Department! Search warrant!" Next a deputy shot two Remington 870 12-gauge, "shok lock," rounds into the lock mechanism, but the door still remained secure. Finally, the deputy shot two one-ounce, 12-gauge slug rounds into the lock and the door was opened with the pry bar. After a flash diversionary device was deployed through the door, the BCSO SWAT Team entered the structure. The helicopter

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[6] Deputy Little, who had spent several years as a canine officer, carried a black CO_2 fire extinguisher to pacify the reported guard dog, but no dog was found on the property.

[7] Chain link fencing, approximately three feet in height, topped a cinder block wall, which varied in height from about three feet to one foot as it ran from east to west.

[8] More than fifteen attempts were made to open the door in this manner.

hovered at 300 feet, illuminating the area with its Night Sun.[9] The time was approximately 6:05 a.m.

While the BCSO SWAT Team was attempting to enter the rear building, a man, later identified as Mr. Garrison, walked out of the rear of the house at 2619 Quincy, into the backyard. Deputy Little shouted standard departmental warnings at him: "Sheriff's Department." "We're executing a search warrant!" "Go back inside your house!" Mr. Garrison walked toward Deputy Monteith, saying, "What's going on? That's my property." Mr. Garrison did not appear to understand and the police continued giving their warnings. As Mr. Garrison looked directly at him, Deputy Monteith shouted, "Go back in your house! Sheriff's Department! Go back in your house!" Mr. Garrison, however, continued walking toward Deputy Monteith. Deputy Little repeatedly yelled, "Sheriffs Department! We're executing a search warrant! Go back inside your house!" He also shouted, "Police Department! We're executing a search warrant!" At the same time, Officer Bledsoe,[10] standing next to the K-9 truck in the alley behind the Garrison house, yelled twice, "Police Department! Go back inside!" Detective (Det.) Maez, also in the alley, shouted "Police Department! Go back inside!" and turned around so Mr. Garrison could see the word "POLICE" written in six-inch block letters on the back

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[9] The helicopter also recorded the warrant service on its FLIR videotape system.

[10] APD K-9 Officer Bledsoe wore a tactical uniform similar to that of the APD SWAT Unit.

of his raid jacket.[11] When Mr. Garrison got to within seven to ten yards, Deputy Little again yelled at him to go back inside his house. Mr. Garrison finally stood only about seven feet away from and looked directly at Deputy Monteith, who ordered him to go back inside his house. Mr. Garrison responded, "That's my property," and slowly walked back inside his house. Deputy Monteith then heard Deputy Little say something like, "I hope he doesn't come out with a gun." Deputy Monteith thought this was a possibility and that he should be careful.

This initial encounter with Mr. Garrison lasted approximately one minute. The area was illuminated by the helicopter's Night Sun spotlight[12] and none of the officers shined any flashlights or spotlights at Mr. Garrison.[13] When

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[11] Det. Maez's jacket also had a patch on the left shoulder and a badge on the front.

[12] Lighting conditions were undoubtedly poor, particularly from Mr. Garrison's viewpoint. Based on a subsequent APD reinactment, "only vague silhouettes could be seen in the backyard of 2615 Quincy" from Mr. Garrison's bedroom window and "[t]he same conditions were present at the back doorway. The spotlight from the helicopter made body shapes easier to see but only for brief moments." (Pl's. Resp. County's Motion (Docket No. 71), Ex. E at 9; *see id.* Ex. F at 7 ("It was pretty poorly lit. . . . It was all pretty dark. Everything was done by flashlight. . . . [T]here was some illumination from the US Customs A Star, their helicopter. But it wasn't much. . . .").)

[13] Plaintiff questions this fact by quoting a transcription of the "911" call compiled by Det. Rick Foley on December 19, 1996: "[T]hey *had* flashlights in my face and everything." *(Id.* Ex. G at

the helicopter was released,[14] Officer Bledsoe illuminated the area by the rear door of 2619 Quincy with the spotlight on his K-9 Unit vehicle.

At approximately 6:05:30 a.m., Mr. Garrison called "911"[15] and told Emergency Operator 90, Gilbert Duran, "It's at 2619 Quincy, NE. They're breaking into my house. A whole bunch of people." The Operator asked Mr. Garrison who was breaking in, how many people there were, and how they were trying to get in. Mr. Garrison responded that he didn't know who they were, but there was "a whole bunch of

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2 (emphasis added).) According to the transcription produced by Paul Ginsberg, President of Professional Audio Laboratories, Inc., however, Mr. Garrison said, "They've *got* flashlights on my face and everything. . . ." (Mem. Support City's Motion No. III (Docket No. 31) Ex. A. Attach. 2 at 2 (emphasis added).) Mr. Ginsberg described his qualifications and methodology in detail in his affidavit, which he closed by stating, "To a reasonable degree of certainty, it is my expert opinion that the transcript of Mr. Garrison's 911 call fairly and accurately represents the words spoken and recorded on the Dictaphone logger tape." *(Id.* Ex. A ¶ 24.) Plaintiff provides no other support for her supposition that flashlights were shined in Mr. Garrison's face when he went into his backyard to investigate, and the Court has found none. Rather, the evidence by affidavit and deposition is that none of the officers did so.

[14] The helicopter was released when execution of the search warrant was completed by entering and securing both buildings at 2615 Quincy.

[15] The quoted language is from the transcription produced by Paul Ginsberg. *(Id* Ex. A, Attach. 2.)

people out there" and they wouldn't let him go out. He estimated there were three to five people and said that he didn't know exactly "because they've got flashlights and everything out there." He stated that they were using axes, hammers, and "all kinds of things," to break in and declared, "I got a gun. I'm gonna go up there and shoot 'em."

The Operator requested that Mr. Garrison remain on the phone and told him that he was "getting somebody out there." The Operator continued questioning Mr. Garrison, asking for a description. Mr. Garrison answered, "They've got flashlights on my face and everything. . . . I'm gonna get my gun." The Operator persisted, asking, "Do you know who they are?" Mr. Garrison replied, "2619. I don't even know nobody or nothin'. Please. Please. I'm gonna go out there, please, thank you. My name is Ralph Garrison." The Operator then said, "Okay, just stay on the phone with me, okay?," to which Mr. Garrison responded, "Okay, I can't, I gotta go see what's happening out there." About twenty seconds later, the Operator told Mr. Garrison, "Okay, just stay on the phone sir. I'm getting somebody out there. Can you see what they're doing?" Mr. Garrison answered, "They're breaking in with axes and [unintelligible]. Please hurry up. Please hurry up. They got flashlights and cars and trucks and all kinds of stuff back there. Please, please hurry up. I'm gonna go out there now. Thank you." The Operator then inquired whether Mr. Garrison could take the phone with him and when Mr. Garrison answered, "Yes," asked him to do so. Mr. Garrison then stated, "They got the lights and everything in my face. . . . Oh yes, I can't see, I can't see, I can barely see nothing what's going on. . . . . I got my gun. I'll shoot the sons of bitches."

At 6:08:22 a.m., an unknown officer is heard saying, "Drop the gun." Another officer follows immediately with, "Put that down." Shots were fired at 6:08:24 and white noise ensued. When deputies reached Mr. Garrison immediately following the shooting, he was lying on the floor inside the glass rear storm door. A fully loaded and cocked .22 caliber nine-shot High Standard brand revolver lay near his feet.

APD SWAT Unit Officer Neal Terry participated in the entry of the main residence at 2615 Quincy. Once that structure was secured, he proceeded to clear the side yard, looking for the Rottweiler, and then, at approximately 6:06 a.m., moved to the backyard to determine if the BCSO SWAT Team required assistance. They had already entered the rear structure, so Officer Terry joined Deputies Little and Monteith at the fence.[16] They were directing their attention toward the rear door of 2619 Quincy, which was illuminated by the K-9 Unit vehicle's spotlight, and was about thirty-five feet away. After discussing the BCSO SWAT Team's entry into the rear structure, Deputy Little described the initial encounter with Mr. Garrison and told Officer Terry that the deputies were providing cover for the BCSO SWAT Team and the White Collar Crimes Unit from any potential threat posed by Mr. Garrison or any other hostile persons who were

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[16] Other officers in the area at this time included Det. Lucero, leaving the rear structure for the main residence, Deputy Eldredge, picking up casings outside the door of the rear structure, Acting Lieutenant (A/Lt.). Bozell, standing a few feet away from Deputy Eldredge and about three feet from Deputy Monteith, and Sergeant Simonson and Deputy Lucero, standing by the BCSO CNT truck by the breached entry gate on the south side of 2615 Quincy.

inside 2619 Quincy. Deputy Little also said something to the effect, "Watch this guy come out with a gun now."

As the conversation continued, Deputy Monteith yelled, "Drop the gun," and then, "Put it down." Mr. Garrison was standing behind the glass storm door of his residence. He moved into the doorway, holding what appeared to be a single action, Colt pattern semi-automatic pistol in his right hand and another object in his left hand.[17] Because Deputy Little was standing between him and the doorway at 2619 Quincy, Officer Terry moved to the right, raised his AR-15 rifle, and trained it on Mr. Garrison.

As Mr. Garrison began opening the storm door with his left hand, he raised the pistol to eye level and pointed it in the direction of Deputy Monteith and the other officers located in that direction. When Det. Lucero, who was standing behind Deputy Monteith, saw that the muzzle of the gun was pointed directly at him, he moved for the cover of the rear building and began to draw his weapon. A/Lt. Bozell and Deputy Eldredge also took cover. Officer Terry, in response to a perceived immediate threat of deadly assault against his fellow officers, fired one round at Mr. Garrison. Seeing Mr. Garrison still standing with the gun raised in his hand, Officer Terry fired a second shot. Deputies Little and Monteith, perceiving similar threats to themselves and the other officers, also fired shots at Mr. Garrison.

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[17] This was later identified as a telephone.

After Mr. Garrison fell from view, Officer Lopez and several deputies[18] entered the backyard of 2619 Quincy and approached the rear door of the residence. Deputies Little and Eldredge reached the back door first and found Mr. Garrison conscious and lying on the floor with the revolver near his feet. As Deputy Little opened the storm door, an aggressive dog stepped over Mr. Garrison toward the officers. Deputy Little shot the Chow.[19]

Deputies Reese and Archibeque remained with Mr. Garrison, who was lying on his back, moving,[20] apparently

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[18] Officer Terry remained at his position at 2615 Quincy and never entered the Garrison property. All of the Sheriff's Department personnel present, except Deputy Fermin Ortega, entered the Garrison residence at some point following the shooting.

[19] Officer Little recognized that the Chow was about to attack and believed it to be a threat to the officers' safety. They could not safely enter and clear the house while the dog was unrestrained and it also prevented medical personnel from entering to assist Mr. Garrison. Deputies could not use chemical mace against the Chow in the confined area of the work room where Mr. Garrison lay without contaminating themselves and medical personnel.

[20] A/Lt. Bozell and Deputy Gonzales stated at their depositions that they did not see Mr. Garrison move as they passed by him into the house. Neither of them, however, stayed with Mr. Garrison, as did Deputies Reese and Archibeque. Both Deputy Reese and Deputy Archibeque testified that Mr. Garrison was moving while they guarded him. It was on being informed of this fact that Deputy Gonzales ordered them to handcuff Mr. Garrison.

making some attempt to sit up. When advised by Deputy Reese that Mr. Garrison was moving, Deputy Gonzales told Deputy Reese to handcuff him for safety reasons.[21] Deputy Archibeque proceeded to handcuff Mr. Garrison, while Deputy Reese covered him with his rifle. Mr. Garrison had been shot in the torso and right wrist. Part of his wrist was missing; there was a "U" shaped wound about halfway into the wrist. Deputy Archibeque applied a cuff to Mr. Garrison's uninjured wrist first, rolled him on his side and then to his stomach, and placed the other cuff on "as gently" as he could to the injured wrist. Mr. Garrison was handcuffed for a few minutes. Once the sweep was completed, Officer Lopez requested medical assistance for Mr. Garrison. APD TEMS Officer Madrid responded and administered basic life support to Mr. Garrison until the house was secured and on-the-scene AFD paramedics could begin their treatment. Officer Madrid assisted in transporting Mr. Garrison to a hospital.

In the meantime, Officer Lopez and other deputies conducted a protective sweep of the house, looking for other suspects.[22] Mrs. Molly Garrison was the only other person

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The Court therefore does not find any genuine issue of material fact as to the issue of whether Mr. Garrison was moving.

[21] At this time, Deputy Gonzales, who was involved in the protective sweep of the house, was not aware of the severity of Mr. Garrison's injuries.

[22] None of the suspected dangerous individuals were found during the execution of the search warrant at 2615 Quincy. The only person present when the warrant was executed was the woman who had originally informed police that counterfeiting equipment

the officers found.[23] Deputy Eldredge encountered Mrs. Garrison, in her night clothes, walking with her walker toward the bathroom adjacent to her bedroom. He twice asked Mrs. Garrison to stop and not go to the bathroom because he needed to search it.[24] Mrs. Garrison did not wait, but went into the bathroom. Deputy Eldredge then told her not to close the door and did not allow her to do so. He maintained continuous eye contact with her while she remained in the

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was kept at that location. She was arrested and told officers that two of the suspects had left minutes before the arrival of the APD and BCSO SWAT teams. Thus, the officers believed that those suspects or other unknown assailants could be at 2619 Quincy.

[23] Mrs. Garrison later recounted that on the morning of December 16, she was awakened by banging and woke her husband by calling to him in the next room. Because of all the lights, she told him, "Look at the house is [sic] on fire." Mr. Garrison got up and went toward the kitchen to get the portable phone. He was gone for "[m]aybe a few minutes, and that's all," and Mrs. Garrison could not see him while he was gone. When he returned he went into his bedroom and she heard him talking on the phone. He then was going out again and when Mrs. Garrison followed him, he told her to go back to her room, which she did. She returned to her bed, from which she could not observe the kitchen or the back door, and she never saw her husband again.

[24] Local law enforcement officers have been trained not to let people go into bathrooms or other rooms and close the door before the room has been secured by authorities. This policy apparently stems from the shooting of an APD officer several years before this incident. The officer allowed a male subject to go into the bathroom. The subject subsequently came out of the bathroom with a gun and shot the officer.

bathroom. Officer Little passed through the bedroom at that time and observed that Mrs. Garrison was sitting on the toilet and that the door was open. After Mrs. Garrison left the bathroom, Deputy Lucero went in and checked to ensure there wasn't anybody else present. He also looked for any weapons, including inside the medicine cabinet. Mrs. Garrison then went back into the bathroom and was allowed to close the door.

As she walked back to her bed from the bathroom Mrs. Garrison saw that deputies were moving her furniture in the living room. Although deputies asked her to wait on the couch in the living room, she chose and was allowed to remain in her bed. Deputies also searched her room and closet, removing everything from her drawers. Although she asked the deputies who they were, what they were looking for, and what was going on, they did not tell her anything. Once the area was secured, however, Deputies Eldredge and Lucero removed their balaclavas, to improve their communication with her and in an attempt to put her more at ease.

Mrs. Garrison appeared to the officers to be in frail condition and in need of assistance in caring for herself.[25] As

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[25] Mr. Garrison provided around-the-clock care for his wife, who was "infirm and could only walk a few steps at a time with a walker." (Second Am. Comp. at ¶ 20.) In her deposition testimony on March 12, 1997, Mrs. Garrison said she was dependent upon her husband twenty-four hours a day as her nurse and housekeeper and to help her walk. She stated that with the aid of her walker she could go to the living room, kitchen, and bathroom, but that she never went as far as the back of the house.

all personnel were needed to secure the crime scene and investigate the shooting, Officer Lopez and A/Sgt. Rodriguez agreed that a relative should be contacted. Mrs. Garrison's son, Benny Garrison, was called. Deputies Lucero and Eldredge stayed with Mrs. Garrison until he arrived at about 7:00 a.m. A/Sgt. Rodriguez briefly explained to him what had occurred that morning and officers helped take Mrs. Garrison to her son's vehicle.

PROCEDURAL BACKGROUND

Mrs. Garrison filed suit on her behalf and as the personal representative of her husband' s estate on December 23, 1996. On July 28, 1997, she amended the complaint. She filed her Second Amended Complaint for Civil Rights Violations and State Tort Claims on October 3, 1997, asserting claims for unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments, supervisory and official capacity liability for violation of constitutional rights, conspiracy to violate civil rights under 42 U.S.C. § 1983, wrongful death caused by law enforcement officers' assault and battery, false imprisonment by law enforcement officers, and negligence of law enforcement officers causing enumerated torts. Over the course of this case, Defendants have filed eleven motions for dismissal or partial summary judgment. On November 14, 1997, the Court heard oral argument on all then pending motions. At that time, City's Motions Nos. III and VI and County's Motion were taken under advisement, in whole or in part, pending

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Deposition testimony by Mrs. Garrison taken on June 13, 1997, has also been submitted in part to the Court.

further discovery and supplemental briefing. (*See* Order, filed March 31, 1998.) Plaintiff filed her Amended Supplemental Response on March 25, 1998, and Defendants City and County responded on March 31, 1998, and April 2, 1998, respectively. Additionally, the City filed its Motion No. VII on January 8, 1998, and the County its Supplemental Motion on August 5, 1998, both of which address issues related to those in the Motions previously taken under advisement.

ANALYSIS

Section 1983 Claims

1. Unreasonable Seizure of Mr. Garrison

Plaintiff asserts that Defendants seized Mr. Garrison without probable cause and used excessive force by shooting him and subsequently handcuffing him, in violation of the Fourth and Fourteenth Amendments. Both the City and the County move for summary judgment on the Plaintiff's unreasonable seizure claim on grounds of qualified immunity. (City's Motion Nos. III and VII and County's Motion and Supplemental Motion.) Their arguments will be considered together.

The doctrine of qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time

the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Thus, once a defendant pleads qualified immunity, the burden shifts to the plaintiff "to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio,* 847 F.2d 642, 646 (10th Cir. 1988).

The defense of qualified immunity is, as a practical matter, of limited value in excessive force cases. This is because police use of excessive force is a clearly established violation of constitutional rights. The focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force used was objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor. *Quezada v. County of Bernalillo,* 944 F.2d 710, 718 (10th Cir. 1991). Thus, "the qualified immunity and excessive force analysis do not differ in any significant respect." *Diaz v. Salazar,* 924 F. Supp. 1088, 1093 (D.N.M. 1996).

The Fourth Amendment's protections regarding a "seizure" are triggered "only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham v. Connor,* 490 U.S. 386, 395 n.10 (1989)(quoting *Terry v. Ohio,* 392 U.S. 1, 19, n.16 (1968) and citing *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989)); *see also County of Sacramento v. Lewis,* 118 S.Ct. 1708, 1715 (1998)("[A] Fourth Amendment seizure [occurs] only when there is a governmental termination of freedom of movement through

means intentionally applied.")(quoting *Brower,* 489 U.S. at 596-97). A § 1983 claim of use of excessive force during a seizure is analyzed by determining "whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances," *Allen v. Muskogee,* 119 F.3d 837, 840 (10th Cir. 1997)(citing *Graham,* 490 U.S. at 397; *Thompson v. City of Lawrence,* 58 F.3d 1511, 1516 (10th Cir. 1995)):

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.

Diaz, 924 F. Supp. at 1093 (ellipses in original) (quoting *Graham,* 490 U.S. at 396-97). The inquiry, then, requires the Court to examine "whether the totality of the circumstances justified a particular sort of . . . seizure," giving consideration to factors such as the severity of the crime at issue, whether the subject poses an immediate threat to the safety of the officers or others, and whether the subject is resisting arrest or attempting to avoid arrest. *Tennessee v. Garner,* 471 U.S. 1, 8-9 (1985).

The excessive force inquiry includes "not only the officers' actions at the moment that the threat was presented, but also *may* include their actions in the *moments* leading up

to the suspect's threat of force." *Allen,* 119 F.3d at 840 (emphasis added). Reasonableness "depends both on whether the officers were in danger at the precise moment that they used force and on whether Defendants' own reckless or deliberate conduct *during the seizure* unreasonably created the need to use such force." *Id.* (emphasis added)(quoting *Sevier v. City of Lawrence,* 60 F.3d 695, 699 (10th Cir. 1995)). Thus, an officer's conduct prior to the suspect's threat of force will be considered by the Court if that conduct is "'*immediately connected*' to the suspect's threat of force." *Id.* (emphasis added)(quoting *Romero v. Board of County Comm'rs,* 60 F.3d 702, 705 n.5 (10th Cir. 1995)); *see also Diaz,* 924 F. Supp. at 1096 ("To the extent pre-seizure conduct is immediately connected, both contemporaneously and causally, to the eventual seizure at issue, that conduct should be examined in determining the objective reasonableness of the force employed to effect the seizure.").

A. Shooting

Defendants maintain that the actual seizure of Mr. Garrison, his being shot by Officer Terry and Deputies Little and Monteith while pointing a gun in their direction, was reasonable and, thus, not a constitutional violation of Mr. Garrison's Fourth Amendment rights. They also contend that in December 1996 the law was not clearly established whether acts immediately connected to the seizure/shooting, those allegedly creating a dangerous situation necessitating the shooting of Mr. Garrison by the police, were relevant in assessing the reasonableness of the officers' actions. *Compare Wilson v. Meeks,* 52 F.3d 1547, 1554 (10th Cir. 1995) (citing *Quezada,* 944 F.2d, at 717), *and Plakas v. Drinski,* 19 F.3d 1143, 1148-49 (7th Cir. 1994), *with Sevier,*

60 F.3d 695, *and Diaz,* 924 F. Supp. 1088. Finally, they argue that even if the preceding acts during the first encounter with Mr. Garrison are considered, Defendants' behavior was lawful.

Plaintiff asserts that Defendants are liable because they generated the necessity to kill Mr. Garrison by recklessly causing him to engage in an assault, that their reckless conduct prior to, but immediately connected with the shooting, created the need to use deadly force against Mr. Garrison. Plaintiff contends that there are genuine issues of material fact as to whether the noise generated by the entry into the rear structure at 2615 Quincy would have caused a reasonable person in Mr. Garrison's position to fear for the safety of his tenants and rental property, causing him to arm himself; whether Defendants knew or recklessly disregarded that Mr. Garrison did not know that they were police officers and that he might, therefore, return with a gun; whether the first encounter was immediately connected to the second; and whether, in light of their knowledge, the officers acted unreasonably in failing to take cover, failing to tell other officers in the yard to take cover, and failing to make another attempt to tell Mr. Garrison who they were.

There is no dispute that Mr. Garrison had a gun in his hand as he began opening his rear storm door at approximately 6:08 a.m. on December 16, 1996, and that he aimed his gun in the direction of Deputy Monteith and the other officers in that area. It therefore was reasonable for Officer Terry and Deputies Little and Monteith to believe that their lives and those of their fellow officers were in danger at that moment and to respond by shooting Mr. Garrison. *See Wilson,* 52 F.3d at 1554 ("Any police officer in Officer

Meeks' position would reasonably assume his life to be in danger when confronted with a man whose finger was on the trigger of a .357 magnum revolver pointed in his general direction.").

The Fourth Amendment does not require use of the least intrusive means, only reasonable ones. *Wilson,* 52 F.3d at 1553-54; *United States v. Melendez-Garcia,* 28 F.3d 1046, 1052 (10th Cir. 1994). The standard, then, is whether from an objective viewpoint and taking all factors into consideration, the police react reasonably to a threat. *Wilson,* 52 F.3d at 1553-54; *Melendez-Garcia,* 28 F.3d at 1052. Officer Terry and Deputies Little and Monteith did so. They reasonably feared for their and their colleagues' lives and they reacted reasonably to that threat. The Fourth Amendment does not require more. *See Diaz,* 924 F. Supp. at 1100 ("[P]olice are not . . . constitutionally required to respond to a suspect's threat of deadly force with non-deadly force or the least intrusive amount of force."); *see also United States v. Myers,* 106 F.3d 936, 940 (10th Cir. 1997)(early morning "military-style assault" in execution of search warrant at suspected marijuana growing operation in home with sleeping children, including battering down door and deployment of "flash-bang" device by agents dressed in black uniforms and wielding automatic machine guns, objectively reasonable).

Finally, even though Defendants may have had a statutory obligation to again warn that they were police before discharging their weapons, violations of state law and police procedure generally do not give rise to a § 1983 claim. *Romero,* 60 F.3d at 705. Furthermore, mere negligent actions precipitating a confrontation are not actionable under § 1983.

Diaz, 924 F. Supp. at 1097 (quoting *Sevier*, 60 F. 3d at 699 n.7).

There is no evidence in this case that any Defendant made a deliberate or reckless decision to escalate the encounter with Mr. Garrison into a deadly confrontation.[26] *See id.* Therefore, considering the facts and circumstances not only of the seizure itself, when Mr. Garrison appeared at his rear door, pointed his gun at the officers, and was shot by them, but also of Defendants' acts and omissions previous to the seizure, including their method of entry of the rear structure and what transpired while Mr. Garrison was in his backyard and when he returned to his house, the Court finds that Defendants' actions were objectively reasonable and that they are entitled to qualified immunity as to the unreasonable seizure claim with regard to the shooting.

B. Handcuffing

Plaintiff also brings an excessive force claim with regard to the handcuffing of Mr. Garrison as he lay on his back several feet away from his weapon, not speaking, bleeding from his torso and missing a large part of his right wrist, and under constant surveillance by enforcement officers. She asserts that handcuffing him was futile and cruel because the gun lay on his right side and his right wrist was clearly and severely incapacitated. Defendants Gonzales,

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[26] Even Plaintiff's expert testified at deposition that, "I think that the initial encounter with Mr. Garrison was in fact reasonable and appropriate." (Pl's. Am. Supplemental Resp. Defs.' Mots. Summ. J. (Docket No. 97), Ex. F at 36.)

Archibeque, and Reese, however, contend that they are entitled to qualified immunity because the handcuffing was reasonable under the circumstances. (County Defs.' Reply County's Supp. Motion (Docket No. 110) at 2-5.)

The Tenth Circuit Court of Appeals addressed the issue of handcuffing an injured assailant in *Wilson*. 52 F.3d 1547. There, Officer Meeks twice shot Mr. Wilson, who fell to the ground face down with his gun underneath him. Officer Stock arrived moments later and disarmed Mr. Wilson by placing his foot on the back of Mr. Wilson's knee to prevent him from trying to shoot, holding him by the shoulder, and locating the gun underneath his body. A police lieutenant arrived soon afterward, prior to the arrival of medical help, and ordered Officer Stock to handcuff Mr. Wilson. No medical care or first aid was given until the arrival of fire department emergency medical technicians. When the technician requested that the handcuffs be removed so Mr. Wilson could be turned on his side to facilitate his breathing, the lieutenant, the only officer then present, refused to do so and told the technician to remove them. It took a minute or two find the key to the handcuffs and remove them. The technician then performed CPR, spelled by the lieutenant, but Mr. Wilson died shortly after arriving at the hospital, according to plaintiffs' experts not of the gunshot wounds, but of asphyxiation. Plaintiffs brought a claim for failure to render medical aid and defendants moved for summary judgment based on qualified immunity.

Applying the Eighth Amendment standard of deliberate indifference to the due process rights of pretrial detainees, the court addressed the handcuffing to the extent it prevented Mr. Wilson from helping himself to breathe.

Finding that the officers could not be expected to know their actions would exacerbate a medical problem, the court also noted

> the detainee was armed and could have posed a threat to human life. As defendants correctly note, the first duty of a police officer is to ensure the safety of the officers and the public. Handcuffing is a necessary expedient to this end. Handcuffing an armed assailant, even after he has been shot, is not a constitutional violation.

Id. at 1556. Thus, the court found no constitutional violation under the Eighth Amendment, specifically commenting, however, that the handcuffing could raise a question of excessive force as it is a forceful seizure, but that question was not at issue. *Id.* at 1547 n.2.

Plaintiff directs the Court to *Howard v. Dickerson,* 34 F.3d 978 (10th Cir. 1994), a case discussed by the *Wilson* court, and *Palmer v. Sanderson,* 9 F.3d 1433 (9th Cir. 1993), in support of her Fourth Amendment excessive force claim. The Court finds Plaintiff's cases inapposite, given the very different circumstances involved here. At the time Mr. Garrison was handcuffed, the situation was very much in flux: Mr. Garrison had only moments before aimed his gun at officers and been shot, and the officers were in the process of conducting a protective sweep of his residence, not knowing who else was present or whether other weapons were available, but believing other dangerous and armed suspects might well be there. Concern for the safety of the officers and others was immediate and real. Additionally, there is no

evidence that there was any intent on the part of the deputies to cause harm to Mr. Garrison in handcuffing him or that the handcuffing adversely affected Mr. Garrison's condition. Deputy Archibeque stated that he put the handcuff on Mr. Garrison's injured wrist "as gently as [he] could," and they were removed after "a few minutes." In light of the surrounding facts and circumstances, the actions of the deputies with regard to handcuffing Mr. Garrison were objectively reasonable and cannot be found to amount to a use of excessive force. *Cf. Fundiller v. City of Cooper City*, 777 F.2d 1436, 1438, 1441 (11th Cir. 1985)(finding "question is close" in reversing dismissal of substantive due process claim of use of excessive force where undercover agent suddenly, without provocation or warning, shot plaintiff five times; other officers did not render aid but dragged him out of car, shackled his hands behind him, exacerbating one wound, stated they hoped he would bleed to death and shouted obscenities at him while he lay face down on ground).

2. Unreasonable Search

Defendants move for summary judgment on Plaintiff's claim that the search of 2619 Quincy violated her Fourth Amendment rights. (City's Motion No. VII; County's Supplemental Motion.) Plaintiff maintains that Defendants exceeded the permissible scope of a protective sweep of the residence by moving furniture in the living room and searching the drawers in her bedroom and the bathroom cabinet.

A protective sweep is "a quick and limited search of premises, . . . narrowly confined to a cursory visual inspection of those places in which a person might be hiding."

Maryland v. Buie, 494 U.S. 325, 326 (1990). It is conducted incident to an arrest to protect the safety of police officers and others. *Id.* In *Buie*, the Supreme Court held that:

> as an incident to the arrest the officers [can], as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the scene.

Id. at 334.

Although Plaintiff contends that moving furniture in the living room exceeds the scope of a protective sweep, the Court does not agree. Mr. Garrison had just threatened the officers by pointing a loaded gun at them. The officers had no idea who was present at 2619 Quincy; the dangerous suspects who they believed were at 2615 Quincy were not found during the execution of the search warrant there and it was not unreasonable, considering Mr. Garrison's actions, for the officers to believe they might be at 2619 Quincy. Therefore, it was prudent of them to investigate the possible presence of other armed and dangerous persons in the vicinity. *See United States v. Tisdale,* 921 F.2d 1095, 1097 (10th Cir. 1990). Moving furniture to ascertain whether persons are hiding behind it is certainly within the ambit of such a search and

Plaintiff has offered no evidence as to what furniture was moved or that Defendants moved furniture for any other purpose.

The search of Mrs. Garrison's bedroom drawers and bathroom cupboard, of course, cannot be justified on grounds of a protective sweep for dangerous persons. This search, however, is valid considering the exigencies of the situation present under the circumstances of this case. *See Warden v. Hayden,* 387 U.S. 294, 298-99 (1967) (necessity for speedy investigation to protect police officers' lives or lives of others justified warrantless entry and search for persons and weapons to insure suspect was only one present and that police had control of all weapons which could be used against them or to effect escape).

Although Plaintiff argues that Deputy Lucero had no reasonable suspicion that Plaintiff posed any danger at all to Defendants, the Court cannot agree. Mrs. Garrison remained in her bedroom and made use of the adjacent bathroom. Mr. Garrison had just aimed a gun at Defendants and a gun in Mrs. Garrison's hand would have posed no less danger to them. Therefore, the limited search for weapons in the drawers and cupboard in these areas to which Mrs. Garrison was given access did not violate her rights. *See United States v. Hernandez,* 941 F.2d 133, 135-38 (2d Cir. 1991) (quick search for weapons in area around bed where officer intended to place non-suspect, handcuffed female, including drawers next to bed and between mattress box and spring, justified to neutralize threat of physical harm)(citing and discussing *Terry,* 392 U.S. 1; *Michigan v. Long,* 463 U.S. 1032 (1983); and *Buie,* 494 U.S. 325).

3. Unreasonable Seizure of Mrs. Garrison

Defendants move for summary judgment on Plaintiff's unreasonable seizure claims. Mrs. Garrison asserts that Defendants seized and detained her without reasonable suspicion, in violation of her Fourth Amendment rights. Specifically, she claims Defendants exceeded any community caretaking function and acted unreasonably in following her around, watching her use the toilet, and refusing to tell her what had happened to her husband and allowing her to go to him.

Law enforcement officers have occasion to seize a person for a variety of reasons, some of which have nothing to do with a desire to prosecute for crime. *United States v. King,* 990 F.2d 1552, 1560 (10th Cir. 1993)(quoting *Terry,* 392 U.S. at 13). "Indeed, police officers are not only permitted, but expected, to exercise . . . 'community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *Id.* (quoting *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973)). Such purposes include seizures to "ensure the safety of the public and/or the individual." *Id.* Whether such a seizure is reasonable under the Fourth Amendment first "depends upon whether it is based on specific articulable facts and requires a reviewing court to balance the governmental interest in the police officer's exercise of his or her 'community caretaking function' and the individual's interest in being free from arbitrary government interference." *Id.*

The second prong of the reasonableness inquiry requires a court to determine "whether the officer's action is

'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Id.* at 1562 (quoting *Terry,* 392 U.S. at 20). The focus is on "whether the facts available to the officer would 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Id.* (quoting *Terry,* 392 U.S. at 21-22.) Such evaluation is to be guided by "common sense and ordinary human experience," *id.* (quoting *United States v. Sharpe,* 470 U.S. 675, 685 (1985)), and while the officer is not required to use the least intrusive means during the course of the detention, the Court must determine whether "failure to use less intrusive means was unreasonable," *id.* at 1562-62 (citing *Sharpe,* 470 U.S. at 686-87).

Officers encountered Mrs. Garrison while conducting their protective sweep of 2619 Quincy after the shooting of Mr. Garrison. As discussed above, it was reasonable for them, in the interests of safety, to search the premises for anyone posing a danger. Initial detention of anyone found, including Mrs. Garrison, likewise was reasonable. Mrs. Garrison, however, was detained for about one hour while authorities contacted and awaited the arrival of her son. Given her physical condition, the nature of the events that had just transpired, and the needs of the police in securing and investigating the crime scene, Defendants had more than sufficient factual basis to exercise their community caretaking functions over Mrs. Garrison. Additionally, balancing the governmental interests at stake and Mrs. Garrison's right to be free from interference finds the former vastly outweighing the latter. Indeed, it is clear that Mrs. Garrison in all likelihood was unable to care for herself. Thus, Defendants detention of Mrs. Garrison must be found to have been justified at its inception and justified in its length.

Mrs. Garrison, however, complains of the degree of interference she experienced: Deputies Eldredge and Lucero were always present, watched her use the toilet in her bathroom, and would not answer her questions as to what was happening. Considering the circumstances of this case, that the deputies stayed with Mrs. Garrison until her son arrived certainly falls within the realm of common sense. Additionally, under the circumstances, the Court cannot find that the deputies' failure to tell Mrs. Garrison what had happened or to allow her to go to her husband was inappropriate. Furthermore, while their act of watching her use the toilet was certainly highly intrusive, it too was reasonably related in scope to facts initially justifying Mrs. Garrison's detention, the safety of the officers. Until officers could search the areas immediately available to Mrs. Garrison for weapons, it was reasonable of them to keep her under constant surveillance. Just as the search of the bathroom cupboard and bedroom drawers was justified, so, too, was the act of keeping Mrs. Garrison under watch until the search could be completed. As Defendants maintain, anyone, even the elderly and infirm, should be considered a threat if he or she has access to a gun. Therefore, as Mrs. Garrison has not stated a violation of a constitutional right, Defendants are entitled to qualified immunity.

4. Section 1983 Claims Against APD Radio Dispatchers and 911 Operators

Defendant APD Radio Dispatchers Baca, Patrick, and Marquez and 911 Operator Duran move for summary judgment on the § 1983 claim. (City's Motion No. VI.) Mr. Duran took Mr. Garrison's call to "911." The computers were down when the call came in, so Mr. Duran was unable

to enter the information he gathered and send it to a dispatcher. Instead, Mr. Duran stood up and said that somebody had a gun, there were several subjects outside, and it was on Quincy, thus inquiring if any of the dispatchers present knew of a police operation on Quincy. Ms. Marquez, who was sitting right on front of Mr. Duran, turned around and told him that there was a possible SWAT call on Quincy, but she didn't know if it was his address. Mr. Duran looked at Ms. Marquez, but did not answer her as he was still on the call.

Plaintiff argues that the dispatchers and operators personally participated in the constitution deprivations she alleges because such deprivations would not have occurred but for their conscious withholding of information from Mr. Garrison: that despite knowing of the overwhelming likelihood that the people Mr. Garrison called about were police officers, Mr. Duran did not tell this to Mr. Garrison. She also maintains that these Defendants acted unreasonably in acquiescing to Mr. Garrison when he said he had a gun and intended to go to the back door and not telling him to remain in his house and put down the gun.

As the Court has already determined that the officers on the scene at Quincy are entitled to summary judgment on each of Plaintiff's constitutional claims, the same must be held with regard to the APD dispatchers and 911 operators. Additionally, these Defendants acts and/or omissions in no way meet the requisite level of reckless or deliberate conduct necessary to sustain a § 1983 claim. *See Sevier,* 60 F.3d at 699 & n.7.

5. Supervisory Liability, Official Capacity Liability, and Conspiracy

Having found Defendants entitled to summary judgment on Plaintiff's constitutional claims, the Court also will grant County Defendants summary judgment on her supervisory liability, official capacity liability, and conspiracy claims, (County's Motion, County's Supplemental Motion). *See Thompson,* 58 F.3d at 1517. The Court also notes that there is no evidence of any affirmative link between Sheriff Bowdich, Captain Linthicum, or Captain Stebleton and the BCSO deputies who allegedly violated Plaintiff's constitutional rights. *See Woodward v. Worland,* 977 F.2d 1392, 1400 (10th Cir. 1992). Additionally, there is absolutely no evidence of any failure to take action, train, or supervise or longstanding custom, practice, or policy of deliberate indifference by the County Defendants regarding violations of the constitutional rights of persons with whom their subordinates came into contact. Finally, there is also no evidence of any conspiracy in this case.

State Law Claims

1. Negligence of APD Dispatchers and 911 Operators

City Defendants move for summary judgment on the state tort claims asserted against the APD radio dispatchers and 911 operators. (City's Motion No. VI.) They maintain that these individuals are immune from suit. The Court agrees.

Pursuant to the New Mexico Tort Claims Act, "any public employee while acting with the scope of duty [is]

granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. N.M. Stat Ann. § 41-4-4(A)(Michie 1996 Repl. Pamph.). This general grant of immunity is waived for certain enumerated torts committed by law enforcement officers:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

Id. § 41-4-12. "Law enforcement officer" is defined as

> any full-time salaried public employee of a governmental entity whose *principal duties* under law are to hold in custody any person accused of a criminal offense, *to maintain public order* or to make arrests for crimes, or members of the national guard when called to active duty by the governor.

Id. § 41-4-3(D)(emphasis added).

Defendants Baca, Patrick, Marquez, and Duran contend that they are not "law enforcement officers" within the meaning of the Tort Claims Act. Plaintiff responds that their principal duties fall within the statutory element of "maintaining public order." Neither party has alerted the Court to any New Mexico case that addresses whether police dispatchers or 911 operators are law enforcement officers under the Act, and the Court has found none, but other case law is informative.

Whether an individual is a law enforcement officer for purposes of the Tort Claims Act is "determined by examining 'the character of the principal duties involved, those duties to which employees devote a majority of their time.'" *Weinstein v. City of Santa Fe,* 121 N.M. 646, 650, 916 P.2d 1313, 1317 (1996)(quoting *Anchondo v. Corrections Dep't*, 100 N.M. 108, 110, 666 P.2d 1255, 1257 (1983)). Determination of whether an individual's principal duties are "to maintain public order" requires "review of the employee's day-to-day duties, responsibilities, and activities" which are then "measured against the admittedly amorphous standard of the duties and activities traditionally performed by law enforcement officers." *Coyazo v. State,* 120 N.M. 47, 50, 897 P.2d 234, 237 (Ct. App. 1995). This determination is "fact specific, but informed by a practical, functional approach as to what law enforcement entails today." *Id.* at 51, 897 P.2d at 238.

The Human Services Department's job classification and compensation descriptions for APD radio dispatchers and 911 operators respectively provide:

General Statement of Duties

> [Police Dispatcher]: Operate a communications console consisting of Computer Aided Dispatch system, Enhanced 9-1-1 and two-way radio systems. Coordinate and dispatch Police Officers in response to emergency and non-emergency calls for service. Coordinate and monitor the ongoing activities of field personnel. Operate the National Crime Information center (NCIC) and Albuquerque Computerized Telecom Information Orientation Network (ACTION) and teletype machine when necessary.
>
> [9-1-1 Operator]: Receive, evaluate, prioritize and relay 9-1-1 emergency calls for medical, police and fire services which require dispatch. Receive, evaluate, prioritize and relay non-emergency and ring-down lines.

(Mem. Supp. City's Motion No. VI (Docket No. 75) Ex. A at 2, 4.)

Additionally, the "Typical Duties and Responsibilities" listed for each job are:

> [Police Dispatcher]
> 1. Receive requests for emergency and non-emergency police assistance from 9-1-1 operator. Prioritize and dispatch appropriate and available officer(s) via voice transmission and/or Computer Aided Dispatch (CAD) system.

2. Receive, monitor and update information via radio transmission and/or CAD system concerning status and activities of officers.
3. Relay applicable NCIC, teletype and other essential information to officers concerning ongoing activities.
4. Answer and respond to phone calls from internal and external sources and service channel requests as well as inquiries by CADs/radio from Police Officers.
5. Perform the same duties as the 9-1-1 Operators and operate the NCIC and ACTION terminals and teletype machines as needed.
6. Maintain complete logs of calls on the service channel.
7. Perform other duties as they relate to the job.

[9-1-1 Operator]

1. Assume control of callers to 9-1-1, determine the nature of the emergency, obtain detailed and accurate information from the caller and relay the emergency information to the appropriate dispatcher.
2. Verify origination of emergency calls.
3. Receive, evaluate, prioritize and relay non-emergency and ring-down lines.
4. Maintain logs for runaways and abandoned vehicles.
5. Operate special hearing impaired telephones (TTY) to receive incoming calls for services.
6. Monitor special alarms tied into the 9-1-1 system.

7. May relay official and non-official messages to officers in the field.
8. Perform other duties as they relate to the job.

(*Id.*)

The comparison to be drawn then is "between the primary activities of the public employee in question and the normal commonplace activities of, for example a police officer on patrol." *Coyazo*, 120 N.M. at 50, 897 P.2d at 237. Applying this practical approach, it is clear that APD radio dispatchers and 911 operators are not engaged in the same activities as the officer on patrol. Rather, their duties are more analogous to those of secretaries or administrative assistants and as such, they are not "law enforcement officers." *See Weinstein,* 121 N.M. at 650 n.2, 916 P.2d at 1317 n.2 ("[P]olice secretaries and couriers would not be considered law enforcement officers under the Act because their principal duties do not include making arrests or keeping the peace."). Therefore, Defendants' Motion will be granted.

2. Assault and Battery

Officer Terry moves for summary judgement on Plaintiff's assault and battery claim. (City's Motion No. VI.) Under New Mexico law, for there to be a tortious assault, there must be an act, threat, or some other menacing conduct which causes another person to reasonably believe that he or she is in danger of receiving an immediate battery. *Baca v. Velez,* 114 N.M. 13, 15, 833 P.2d 1194, 1196 (Ct. App. 1992). Under the facts of this case, there is no way the Court can find that Mr. Garrison could "reasonably" believe that he was in danger of an immediate battery. During his first

encounter with the officers, not one of them threatened him by word, action, or other menacing conduct. No officer touched Mr. Garrison, approached him, or entered his backyard. The officers identified themselves and their mission and told him to return to his house, which he did. No one followed him or interfered with him while he recrossed his backyard and none of the officers had any contact with him while he remained in his house. The APD and BCSO officers were lawfully executing a search warrant at 2615 Quincy and none of their conduct was directed at Mr. Garrison, except to order him to return to his house at 2619 Quincy. Additionally, Officer Terry did not even participate in the initial encounter with Mr. Garrison. Thus, his Motion must be granted as to the assault claim.

As to the battery claim, Officer Terry argues that he is entitled to summary judgment on grounds that he acted in good faith and with probable cause. The New Mexico Supreme Court has recognized that

> [o]fficers, within reasonable limits, are the judges of the force necessary to enable them to . . . preserve the peace. When acting in good faith, the courts will afford them the utmost protection and they will recognize the fact that emergencies arise when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court.

Mead v. O'Connor, 66 N.M. 170, 173, 344 P.2d 478,479-80 (1959). When Mr. Garrison reappeared at his back door and aimed his gun at Defendants, he committed the crime of

aggravated assault. Perceiving an immediate threat of serious physical harm to himself and the other officers present, Officer Terry reacted in an objectively reasonable manner by shooting Mr. Garrison.

Although Plaintiff maintains that Defendants provoked Mr. Garrison and were somehow responsible for causing him to reappear with his gun and threaten them from his back door, this argument is unsupported by the facts or law. Plaintiff does not and cannot argue that Defendants had any duty to inform Mr. Garrison of their intention to serve a search warrant on his rental property. Additionally, Mr. Garrison had no legal right to point his gun at the officers or to use force in an attempt to interfere with their execution of the search warrant. *State v. Johnson,* 124 N.M. 647, 654, 934 P.2d 79, 86 (Ct. App. 1997)("[A] homicide by a private citizen . . . is justifiable only if 'necessarily committed . . . by lawful ways and means,' meaning that deadly force in the apprehension of suspected felons is justifiable only when the citizen has probable cause to believe he or she is threatened with serious bodily harm or the use of deadly force.")(quoting N.M. Stat. Ann. § 30-2-7(C)); *Brown v. Martinez,* 68 N.M. 271, 280, 361 P.2d 152, 159 (1961)("[S]ince the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury where only the property is threatened."). Therefore, Officer Terry's Motion also will be granted as to the battery claim.

3. False Imprisonment

City Defendants move for summary judgment on Mrs. Garrison's false imprisonment claim. (City's Motion No. VII.) False imprisonment involves "unlawful interference with the personal liberty or freedom of locomotion of another." *Martinez v. Sears, Roebuck & Co.*, 81 N.M. 371, 373, 467 P.2d 37, 39 (Ct. App. 1970). Confinement in jail or custody is not required, and the requisite restraint

> may arise out of words, acts, gestures or similar means which induce reasonable apprehension that force will be used if the plaintiff does not submit and it is sufficient if they operate upon the will of the person threatened and result in a reasonable fear of personal difficulty or personal injuries.

Id. Reasonable cause, however, is a defense to a claim of false imprisonment. *Diaz v. Lockheed Elecs.*, 95 N.M. 28, 30, 618 P.2d 372, 374 (Ct. App. 1980)(citing and discussing *Stienbaugh v. Payless Drug Store, Inc.*, 75 N.M. 118, 401 P.2d 104 (1965)).

Defendants maintain that they had reasonable cause to restrain Mrs. Garrison and the Court agrees. As discussed in regard to Mrs. Garrison's unreasonable seizure claim, the officers, as a matter of law, had reasonable cause to restrain her for their and her protection, to meet their community caretaking responsibilities, and to allow the investigation into the shooting to proceed. Thus, summary judgment will be granted as to Mrs. Garrison's false imprisonment claim.

IT IS HEREBY ORDERED that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim, (Docket No. 30), filed July 17, 1997, is **GRANTED**.

IT IS FURTHER ORDERED THAT Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997, is **GRANTED IN PART** as to the unlawful seizure claims regarding Mr. and Mrs. Garrison, official capacity liability, supervisory liability, and conspiracy.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997, is **GRANTED IN PART** as to the assault and battery claim against Officer Terry, and the § 1983 and state law claims against the APD radio dispatchers and 911 Operators.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VII: Qualified Immunity for Defendant Officers Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 85), filed January 8, 1998, is **GRANTED**.

IT IS FURTHER ORDERED that County Defendants' Supplemental Motion for Summary Judgment on

Plaintiffs' Civil Rights Claims (Docket No. 108), filed August 5, 1998, is **GRANTED**.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

[Filed March 31, 1998]

No. CIV 96-1801 LH/DJS

MOLLY GARRISON, individually and as the personal representative of the ESTATE OF RALPH GARRISON, deceased,
Plaintiff,

v.

CHIEF JOSEPH POLISAR, LIEUTENANT RUBEN DAVALOS, LIEUTENANT J.R. DEBUCK, LIEUTENANT JUDD SCHAFFER, SERGEANT KEVIN MCCABE, ACTING SERGEANT STEVE RODRIGUEZ, OFFICER HOWARD NEAL TERRY, OFFICER CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, SHERIFF JOSEPH BOWDICH, SERGEANT KENNETH BOZELL, CAPTAIN DAVID LINTHICUM, CAPTAIN LARRY STEBLETON,

DEPUTY ERIK LITTLE, DEPUTY)
JAMES MONTEITH, DEPUTY JAMES)
GONZALES, DEPUTY PATRICK)
LUCERO, DEPUTY FERMIN ORTEGA,)
DEPUTY GREG REESE, DEPUTY)
DAVID ARCHIBEQUE, and DEPUTY)
VAN ELDREDGE in their individual and)
official capacities,)
Defendants.)
)

ORDER

THIS MATTER came on for consideration of City Defendants' Motion to Dismiss Gross Negligence, Negligent Execution of a Search Warrant, Negligent Use of Equipment, and Punitive Damages Claims (Docket No. 17), filed June 24, 1997; City Defendant's Motion for Partial Summary Judgment No. I: Qualified Immunity for Chief Polisar Against Fourth Amendment Excessive Force Claim (Docket No. 22), filed July 17, 1997; City Defendants' Motion for Partial Summary Judgment No. II: Qualified Immunity for Officer Terry Against Fourth Amendment "Illegal Search" Claim (Docket No. 26), filed July 17, 1997; City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (Docket No. 30), filed July 17, 1997; City Defendants' Motion for Partial Summary Judgment No. IV: Qualified Immunity for Officer Terry Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 34), filed July 17, 1997; City Defendants' Motion to Dismiss No. II: Fourteenth Amendment Substantive Due Process, Assault, and Battery

Claims (Docket No. 51), filed September 3, 1997; City Defendants' Motion for Partial Summary Judgment No. V: Qualified Immunity for Individual City Defendants Against the Estate's Fourteenth Amendment Substantive Due Process Claims (Docket No. 64), filed September 20, 1997; Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997; and City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997. Upon hearing oral argument on these Motions on November 14, 1997, and for the reasons set forth on the record in open court, the Court finds that City Defendants' Motion to Dismiss Gross Negligence, Negligent Execution of a Search Warrant, Negligent Use of Equipment, and Punitive Damages Claims; City Defendant's Motion for Partial Summary Judgment No. I: Qualified Immunity for Chief Polisar Against Fourth Amendment Excessive Force Claim; City Defendants' Motion for Partial Summary Judgment No. II: Qualified Immunity for Officer Terry Against Fourth Amendment "Illegal Search" Claim; City Defendants' Motion to Dismiss No. II: Fourteenth Amendment Substantive Due Process, Assault, and Battery Claims; and City Defendants' Motion for Partial Summary Judgment No. V: Qualified Immunity for Individual City Defendants Against the Estate's Fourteenth Amendment Substantive Due Process Claims are not well taken and will be **denied as moot**. The Court finds that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment

Excessive Force Claim will be taken under advisement, pending further discovery and supplemental briefing. The Court finds that City Defendants' Motion for Partial Summary Judgment No. IV: Qualified Immunity for Officer Terry Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims is well taken and will be **granted**. The Court finds that Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims will be **denied as moot in part** as to the issue of the use of the SWAT team during the execution of the search warrant; the Motion is not well taken as to the issue of the search of 2619 Quincy and will be **denied in part**; and the Motion will be taken under advisement in all other respects, pending further discovery and supplemental briefing. The Court finds that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators is well taken in part as to the supervisory liability and conspiracy claims and will be **granted in part**; the Motion is taken under advisement in all other respects, pending further discovery and supplemental briefing.

IT IS HEREBY ORDERED that City Defendants' Motion to Dismiss Gross Negligence, Negligent Execution of a Search Warrant, Negligent Use of Equipment, and Punitive Damages Claims (Docket No. 17), filed June 24, 1997; City Defendant's Motion for Partial Summary Judgment No. I: Qualified Immunity for Chief Polisar Against Fourth Amendment Excessive Force Claim (Docket No. 22), filed July 17, 1997; City Defendants' Motion for Partial Summary

Judgment No. II: Qualified Immunity for Officer Terry Against Fourth Amendment "Illegal Search" Claim (Docket No. 26), filed July 17, 1997; City Defendants' Motion to Dismiss No. II: Fourteenth Amendment Substantive Due Process, Assault, and Battery Claims (Docket No. 51), filed September 3, 1997; and City Defendants' Motion for Partial Summary Judgment No. V: Qualified Immunity for Individual City Defendants Against the Estate's Fourteenth Amendment Substantive Due Process Claims (Docket No. 64), filed October 20, 1997, are **DENIED AS MOOT**.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. III: Qualified Immunity for Officer Terry Against Fourth Amendment Excessive Force Claim (Docket No. 30), filed July 17, 1997, is taken under advisement, pending further discovery and supplemental briefing.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. IV: Qualified Immunity for Officer Terry Against Fourth Amendment "Unlawful Search and Seizure" and False Imprisonment Claims (Docket No. 34), filed July 17, 1997, is **GRANTED**.

IT IS FURTHER ORDERED that Bernalillo County Defendants' Motion for Summary Judgment on Plaintiff's Civil Rights Claims (Docket No. 69), filed October 24, 1997, is **DENIED IN PART, DENIED IN PART AS MOOT**, and taken under advisement in part, pending further discovery and supplemental briefing.

IT IS FURTHER ORDERED that City Defendants' Motion for Partial Summary Judgment No. VI: Supervisory

Liability Claim Against Chief Polisar, Lt. DeBuck, and Lt. Schaffer, Assault and Battery Claim Against Officer Terry, § 1983 Conspiracy Claim, and § 1983 and State Tort Claims Against the APD Radio Dispatchers and 911 Operators (Docket No. 74), filed November 5, 1997, is **GRANTED IN PART** and is taken under advisement in part, pending further discovery and supplemental briefing.

/s/_____
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed October 12, 2000]

No. 99-2193
(D.C. No. CIV-96-1801-LH/DJS)

BEN GARRISON, as personal representative of the Estates of Ralph Garrison deceased and Molly Garrison, for Molly Garrison individually,
Plaintiff-Appellant,

v.

JOE POLISAR, Albuquerque Police Chief, JOE BOWDICH, Bernalillo County Sheriff, in their official and individual capacities; HOWARD NEAL TERRY, ERIK LITTLE, JAMES MONTEITH, Sheriff's Officers, in their individual capacities; LT. RUBEN DAVALOS, LT. J. R. DEBUCK, LT. JUDD SCHAFFER, SGT. KEVIN McCABE, Albuquerque Police Supervisors; STEVE RODRIGUEZ, Acting Sgt.; CHARLES LOPEZ, Albuquerque

Police Officer; CHRISTINA BACA,)
MARY PATRICK, MARY MARQUEZ,)
GILBERT DURAN, Albuquerque)
Police Dispatchers/Operators;)
SGT. KENNETH BOZELL,)
LT. LINTHICUM, CAPTAIN)
STEBLETON, Bernalillo County)
Sheriff's Supervisors; JAMES)
GONZALES, PATRICK LUCERO,)
FERMIN ORTEGA, GREG)
REESE, DAVID ARCHIBEQUE,)
DEPUTY VAN ELDREDGE,)
Bernalillo County Sheriff's Officers,)
Defendants-Appellees.)
)

ORDER

Before **TACHA**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **MAGILL**,* Senior Circuit Judge.

This matter is before the court on appellant's petition for rehearing and request for en banc review. We also have responses from the Bernalillo County defendants and the City defendants. Upon consideration of those pleadings, the petition for rehearing is denied by the panel of judges who heard this matter originally.

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* Honorable Frank J. Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

The petition and responses were circulated to all the active judges of this court. *See* Fed. R. App. P. 35(a). No judge having called for a poll, the en banc suggestion is likewise denied.

PATRICK FISHER
Clerk of Court

by: /s/_____
Elisabeth A. Shumaker
Chief Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Filed August 25, 2000]

No. 99-2193

BEN GARRISON, as Personal Representative of the Estates of Ralph and Molly Garrison, *Plaintiff-Appellant,*	)
vs.	)
JOSEPH POLISAR, RUBEN DAVALOS, J.R. DEBUCK, JUDD SCHAFFER, KEVIN MCCABE, STEVE RODRIGUEZ, HOWARD NEAL TERRY, CHARLES LOPEZ, CHRISTINA BACA, MARY PATRICK, MARY MARQUEZ, GILBERT DURAN, JOSEPH BOWDICH, KENNETH BOZELL, DAVID LINTHICUM, LARRY STEBLETON, ERIK LITTLE, JAMES MONTEITH, JAMES GONZALES, PATRICK LUCERO, FERMIN ORTEGA, GREG REESE, DAVID ARCHIBEQUE, and VAN ELDREDGE in their individual	)

and official capacities,)
Defendants-Appellees.)
_____)

On Appeal from the United States District Court
for the District of New Mexico
The Honorable C. Leroy Hansen, District Judge
Dist. Ct. No. CIV 96 1801 LH/DJS

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Respectfully submitted,

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STATEMENT OF BASIS OF PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC*

Pursuant to Federal Rule of Appellate Procedure 35 (b)(1), Plaintiff-Appellant hereby states that the Panel Decision in this matter conflicts with decisions of the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit, namely:

- Allen v. City of Muskogee, 119 F.3d 837 (10th Cir. 1997);
- Myers v. Oklahoma County Board of County Commissioners, 80 F.3d 421 (10th Cir. 1996);
- Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995);
- United States v. Hogan, 38 F.3d 1148, 1149 (10th Cir. 1994); and,

- Salve Regina College v. Russell, 499 U.S. 225 (1991).

Consideration of this Petition is therefore necessary to secure and maintain uniformity of the Court's decisions.

Further, the proceeding involves a question of exceptional importance, specifically, whether in excessive force cases in which the defense of qualified immunity is raised, the trial court or the jury should decide the ultimate, merged inquiry of whether the defendant police officer's actions were objectively unreasonable.

ARGUMENT

In this civil action, Plaintiff Ben Garrison, as personal representative of the Estates of Ralph and Molly Garrison, sued Defendants Polisar, Davalos, DeBuck, Schaffer, McCabe, Rodriguez, Terry, Lopez, Baca, Patrick, Marquez, and Duran ("City Defendants"), and Defendants Bowdich, Bozell, Linthicum, Stebleton, Little, Monteith, Gonzales, Lucero, Ortega, Reese, Archibeque, and Eldredge ("County Defendants"), alleging that these Defendants violated Plaintiff's parents' Fourth Amendment rights when they shot and killed Mr. Garrison, seized and evicted Mrs. Garrison, and searched the Garrisons' home in the course of executing a search warrant next door. (Aplt. App. at 0353-68; 0959-60.) Plaintiff also alleged violations of state tort law based on these actions. (Id.)

The trial court entered three Orders addressing Defendants' several motions to dismiss and for summary judgment. On March 31, 1998, the trial court granted the City

Defendants summary judgment on Plaintiff's supervisory liability claims. (Id. at 0843-48.) On March 12, 1999, the Court granted the City Defendants summary judgment on all of Plaintiff's remaining claims, and granted the County Defendants summary judgment on Plaintiff's section 1983 claims. (Id. at 0961-0998.) Finally, on May 12, 1999, the trial court granted the County Defendants summary judgment on Plaintiff's state law claims, and dismissed the case. (Id. at 1015-17.) Plaintiff timely filed a notice of appeal on June 10, 1999. (Id. at 1018-19.) A panel of this Court affirmed the trial court's rulings by Order and Judgment filed August 11, 2000. (Petition Appendix.)

On December 16, 1996, in the dark of early morning, Defendants executed a warrant at 2615 Quincy. (Aplt. App. at 0965-66.) The warrant authorized a search of the premises and of certain named individuals suspected of counterfeiting documents. (Id. at 0963.) Ralph and Molly Garrison owned 2615 Quincy and resided next door at 2619 Quincy. (Id.) They rented 2615 Quincy to tenants. (Id.) Neither the Garrisons, nor 2619 Quincy, were subjects of the search warrant. (Id.) Mr. and Mrs. Garrison were visibly elderly. (Id. at 0914, 0962, 0974.)

On December 16, 1996, the Garrisons were awakened by what they believed to be an attack by thugs at their rental property. (Id. at 0973.) Defendants, officers of the Albuquerque Police Department and the Bernalillo County Sheriff's Department, had surrounded 2615 Quincy. (Id. at 0965-66.) A helicopter hovered overhead, and Defendants were using flash/bang devices, ramming tools, and 12-gauge shotgun "shok lock" rounds to enter 2615 Quincy. (Id. at 0967.) The clamor of Defendants' activities caused Mr.

Garrison to fear for the safety of himself, his wife, his property, and his tenants. (Id. at 0757-58.) He went out his back door to investigate. (Id. at 0967.) Visibility, from Mr. Garrison's perspective, was virtually nil, and the helicopter roared. Defendants shined lights in his face, (id. at 0234-37), and several officers simultaneously shouted "police" and "sheriff," and commanded him to return inside. (Id. at 0967.) He visibly did not understand what Defendants were saying, and remained outside until Defendant Little became "mad" and shouted at him to go back inside. (Id. at 0801-02.) Defendant Little acknowledged that Mr. Garrison appeared to be responding to the sound of the officers' voices without understanding. (Id.)

Defendants Little and Monteith knew that Mr. Garrison did not realize they were officers, and thought he might return outside "with a gun."[1] (Id. at 0758.) They communicated their concern to Defendant Terry. (Id. at 0758, 0970.) Nevertheless, these Defendants neither took advantage of copious available cover, nor warned other officers to do so. (Id. at 0758-59.) Further, they made no attempt to approach Mr. Garrison in a calm, intelligible manner, *e.g.*, by knocking on his front door, to explain to him that they were police officers. (Id.) There were numerous officers available to approach Mr. Garrison in this way. (Id.)

Meanwhile, Mr. Garrison called "911." (Id. at 0234-37.) Defendant Duran took Mr. Garrison's call. (Id. at 0657-

---

[1] Specifically, Defendant Little said to Defendants Monteith and Terry, "watch this guy come out with a gun now." (Aplt. App. at 0818, 0834.)

58.) Mr. Garrison gave his address, and said he thought armed robbers were breaking into his rental property next door. (Id. at 0234-37.) Defendant Duran knew that the people breaking in were officers. (Id.) He also knew that Mr. Garrison did *not* know this critical fact. (Id.) However, Defendant Duran did not so inform Mr. Garrison, even when Mr. Garrison told Defendant Duran that he was going back outside with a gun to shoot the intruders. (Id. at 0234-37.) Instead, Defendant Duran told Mr. Garrison to take the telephone with him, too. (Id.)

From ninety (90) seconds to several minutes after his first encounter with Defendants, Mr. Garrison returned to his back door, with his gun in one hand and his telephone in the other. (Id. at 0758.) He raised the gun, although he could see only "partial shapes." (See, e.g., id. at 0234-37, 0500-04.) Defendants Terry, Little, and Monteith, shouting "drop the gun," shot Mr. Garrison, inflicting the wounds of which he would soon die. (Id. at 0970-73.) The County Defendants entered 2619 Quincy, and found Mr. Garrison lying in the doorway. (Id. at 0971 .) Even though Mr. Garrison was under the constant surveillance of several officers, lying on his back gurgling but not moving, missing a large part of his wrist, and several feet away from any weapon, Defendants Reese and Archibeque handcuffed him under Defendant Gonzales' and Defendant Bozell's supervision. (Id. at 0900.)

Officers including Defendants Little, Monteith, Gonzales, Lucero, and Eldredge, searched the Garrison home. (Id. at 0903-04.) *Inter alia,* these officers moved living room furniture, and searched the Garrisons' medicine cabinet and bedroom drawers. (Id. at 0537-38, 0903.) Defendants also followed Mrs. Garrison around her home, watched her use the

toilet, and refused to tell her what had happened to her husband. (Id. at 0901-02.) Defendants later had Plaintiff Ben Garrison to remove Mrs. Garrison from her home to ease their investigation of the shooting. (See, e.g., id. at 0322-23, 0974.) Mrs. Garrison never saw her husband alive again. (Id. at 0973.)

I. THE COURT SHOULD GRANT REHEARING *EN BANC* IN THIS MATTER TO MAINTAIN THE UNIFORMITY OF ITS DECISIONS.

Federal Rule of Appellate Procedure 35 provides that rehearing *en banc* is appropriate when "necessary to secure or maintain uniformity of the Court's decisions." Fed. R. App. P. 35(a)(1); see also 10th Cir. R. 35.1(A) *(en banc* review serves to focus Court "on a panel decision that conflicts with a decision of the United States Supreme Court or of this [C]ourt"). The Panel Decision in the present matter seriously conflicts with the Supreme Court's and this Court's prior decisions in several respects. Plaintiff will address each of these conflicts in turn.

A. THE PANEL DECISION REJECTED ALLEN, MYERS, AND SEVIER, WHICH GOVERN PLAINTIFF'S EXCESSIVE FORCE CLAIMS BASED ON THE SHOOTING OF MR. GARRISON.

Plaintiff alleged that Defendants used excessive force in shooting and killing Mr. Garrison. The Court's decision in Allen v. City. of Muskogee, 119 F.3d 837 (10th Cir. 1997), cert. denied, 522 U.S. 1148 (1998), fully supports this claim. In Allen, the plaintiff raised excessive force claims on behalf

of her decedent, whom the defendant police officers shot and killed. Id. at 839. The defendants learned that the decedent was armed, suicidal, threatening family members, and had an outstanding arrest warrant against him. Id. When the officers found the decedent, he was sitting in the driver's seat of his car holding a gun. Id.

An officer named Smith ordered the decedent to drop his gun. Id. Smith approached the driver-side door, reached into the car, and tried to take the decedent's weapon. Id. Another officer grabbed the decedent's left arm, and a third officer tried to open the passenger door. Id. The decedent aimed his gun at the third officer, who ducked behind the car. Id. The decedent then aimed his gun at Smith and the second officer. Id. "[S]hots were exchanged," and the decedent was killed. Id. These events, from the officers' arrival to the shooting of the decedent, lasted about a minute and a half. Id.

This Court reversed the district court's grant of summary judgment for the defendants based on qualified immunity. Id. at 839-40. The Allen Court first noted that excessive force claims turn on "whether the officers' actions were objectively reasonable in light of the surrounding facts and circumstances." Id. at 840. Critically, the Court then observed that

> [t]he excessive force inquiry includes not only the officers' actions at the moment that the threat was presented, but also may include their actions in the moments leading up to the suspect's threat of force. . . . The reasonableness of [d]efendants' actions depends *both* on whether the officers were in

> danger at the precise moment that they used force *and on whether [d]efendants' own reckless or deliberate conduct during the seizure unreasonably created the need to use such force.*

Id. (emphasis added). In Allen, this Court found that the officers' actions in the minute and a half before the shooting were immediately connected with the shooting and "should be included in the reasonableness inquiry." Id. at 841. The Court then held that a reasonable factfinder could find that the defendants' actions recklessly precipitated the need to use deadly force, and were therefore objectively unreasonable. Id. at 839-41.

The Court approved similar conclusions in Myers v. Oklahoma County Board of County Commissioners, 80 F.3d 421 (10th Cir. 1996), and Sevier v. City of Lawrence, 60 F.3d 695 (10th Cir. 1995). In Myers, police officers entered the decedent's home even though they knew he was locked inside with a rifle, drunk and suicidal. 80 F.3d at 421. Not surprisingly, this episode ended with the officers shooting the decedent. Id. The district court denied the officers qualified immunity because "there was a genuine issue for trial regarding the reasonableness of defendants' conduct"; and, the appellate court lacked jurisdiction to review this decision. Id. at 424-25. Likewise, in Sevier, the trial court denied the defendant officers qualified immunity where they approached the decedent knowing he was armed and distraught, the decedent lunged at an officer with a knife, and officers shot and killed him. 60 F.3d at 698, 700-01 & n. 10. The Court approved the trial court's denial of qualified immunity, in part because "a jury could conclude that Defendants acted

recklessly by confronting [the decedent] in the manner they did." Id.

In the present matter, the record evidence demonstrates that Defendants' first encounter with Mr. Garrison was "immediately connected" with the second encounter in which Defendants shot Mr. Garrison almost instantly. See Allen, 119 F.3d at 841 (events occurring over minute and a half "immediately connected"). The record evidence also demonstrates that a reasonable factfinder could have concluded that Defendants recklessly precipitated the fatal encounter. According to Plaintiff's evidence, Defendants Little, Monteith, and Terry sat and waited with weapons drawn for Mr. Garrison to return, even though they knew that: (1) they had caused Mr. Garrison to believe they were breaking into his tenants' house and firing weapons; (2) Mr. Garrison did not know they were police officers; and, (3) Mr. Garrison was likely to return with a gun. This behavior was not reasonable; it was the conscious disregard of a substantial risk of serious harm, *i.e.*, it was reckless. (Aplt. App. at 0777-86.) In short, as in Allen, Myers, and Sevier, Defendants recklessly precipitated the need to use deadly force against Mr. Garrison, and their conduct was therefore objectively unreasonable.

In ruling to the contrary, the Panel Decision paid lip service to Allen, Myers, and Sevier, but in fact rejected them. After cursorily describing the facts establishing Defendants' recklessness (ignoring numerous facts and inferences in Plaintiff's favor), the Panel Decision states: "[t]he central fact is that when the fatal shots were fired, Ralph Garrison was aiming his gun at other officers at the scene." (Petition Appendix at 7.) However, Allen, Myers, and Sevier

specifically dictate that, when officers' reckless conduct precipitates a fatal encounter, the "central fact" is *not* that someone was aiming a gun at the officers, but that the officers recklessly caused him to do so. The Court should reject the Panel Decision's attempt to make the wrong fact "central" in this case, grant Plaintiff's petition for rehearing *en banc*, and reverse the trial court's summary judgment on Plaintiff's excessive force claims.

B. THE PANEL DECISION HELD THAT A FULL-BLOWN SEARCH WAS A "PROTECTIVE SWEEP" CONTRARY TO SUPREME COURT AND TENTH CIRCUIT PRECEDENT.

The Panel Decision also applied erroneous legal standards in affirming summary judgment for Defendants on Plaintiff's claims that Defendants illegally searched the Garrisons' home. The Panel Decision's sole reasoning in support of its ruling on this point is:

> [a]fter being shot, the officers followed Ralph Garrison into the house[2] where they made a "protective sweep" for their own safety. . . . Such, in our view, was . . . objectively reasonable.

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[2] This description is misleading because it suggests that Mr. Garrison went back into the house under his own power. In fact, Mr. Garrison was standing in the back doorway of his home when Defendants shot him and he fell backwards into the house. (Aplt. App. at 0970-73.)

(Petition Appendix at 7.) This perfunctory ruling directly contravenes Supreme Court and Tenth Circuit law dictating that Defendants' search of the Garrison home exceeded the scope of a "protective sweep."

"A protective sweep is not a full search, but rather a quick, cursory inspection of the premises, permitted when police officers reasonably believe, based on specific and articulable facts, that the area to be swept harbors an individual posing danger to those on the arrest scene." United States v. Hogan, 38 F.3d 1148, 1149 (10th Cir. 1994); Maryland v. Buie, 494 U.S. 325, 334 (1990); United States v. Parra, 2 F.3d 1058, 1066-67 & n. 4 (10th Cir. 1993). A protective sweep must be "narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Hogan, 38 F.3d at 1150.

Defendants' search of the Garrisons' home patently exceeded the scope of a protective sweep, extending beyond places where a person could hide, to underneath living room furniture, and inside medicine cabinets and bedroom drawers. (Aplt. App. at 0537-38, 0903-04); compare, e.g., United States v. Richards, 937 F.2d 1287, 1291 (7th Cir. 1991) (officer did not exceed scope of protective sweep where he did not "search the drawers or dawdle"), with United States v. Ford, 56 F.3d 265, 270 (D.C. Cir. 1995) (looking under mattress and behind window shade exceeded scope of protective sweep). The Court should therefore grant Plaintiff's petition for rehearing *en banc,* apply the unequivocal Tenth Circuit law governing the permissible scope of protective sweeps, and reverse the trial court's summary judgment on Plaintiff's claims against Defendants based on the unreasonable search of the Garrison's home.

C. THE PANEL DECISION FAILED TO REVIEW ISSUES PROPERLY PRESERVED AND RAISED ON APPEAL CONTRARY TO SUPREME COURT AND TENTH CIRCUIT PRECEDENT.

It is axiomatic that the federal courts "are under a virtually unflagging obligation to exercise the jurisdiction given them." Newland v. First Nat'l Bank in Goodland, 82 F.3d 338, 341 n.2 (10th Cir. 1996) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).) Thus, an appellate court must consider questions placed before it, provided they are properly preserved and raised on appeal. Cf., e.g., Davoll v. Webb, 194 F.3d 1116, 1130 (10th Cir. 1999) (appellate court not obligated to review issue not raised below). This includes an obligation to conduct a careful, *de novo* review of legal questions, including questions of state law. Salve Regina College v. Russell, 499 U.S. 225, 231-40 (1991).

In the present matter, Plaintiff raised on appeal several properly preserved, substantial arguments that the Panel simply failed to review. For example, Plaintiff argued that Defendants used excessive force in handcuffing Mr. Garrison. Courts have determined that "no reasonable officer could believe that the abusive application of handcuffs was constitutional." Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); Martin v. Heideman, 106 F.3d 1308, 1311-12 (6th Cir. 1997). In the present matter, Plaintiff observed that Defendants' handcuffing of Mr. Garrison was both futile and cruel: Mr. Garrison, whose wrist had just been shot half away, was peculiarly unable to reach or manipulate a weapon, and obviously vulnerable to severe pain from pressure applied

to his wrist. The Panel Decision, however, did not even acknowledge this claim.

The Panel Decision also ignored Plaintiff's substantial claims against Defendant Duran, the 911 operator. Defendant Duran consciously withheld from Mr. Garrison the vital information that the persons Mr. Garrison believed to be armed robbers were in fact police officers. He withheld this information even when Mr. Garrison stated he was going to go back outside with a gun. Defendant Duran's behavior was quintessentially reckless, *i.e.*, involving the conscious disregard of a known risk of Mr. Garrison's or a police officer's death. See, e.g., Uhlrig v. Harder, 64 F.3d 567, 573 n.8 (10th Cir. 1995). These egregious actions led to Plaintiff's section 1983 and state tort claims against Defendant Duran. Nevertheless, the Panel Decision did not even mention these claims, much less justify the trial court's summary dismissal of them.

Finally, the Panel Decision did not review the trial court's dismissal of Plaintiff's intentional tort claims, but rather rubber-stamped them with the bare statement, "we are disinclined to disturb the district court's understanding of local New Mexico law or his application thereof to the present facts." (Petition Appendix at 8.) This is directly contrary to the Supreme Court's decision in Salve Regina College, which dictates that the Court of Appeals must undertake a careful, *de novo* review of state law questions, without deference to the trial court's 'local expertise.' 499 U.S. at 231-40. In short, the Panel Decision failed to review several issues of great significance in its apparent rush to reject Plaintiff's appeal at all costs, directly contrary to Supreme Court and Tenth

Circuit precedent.[3] The Court should therefore grant Plaintiff's petition for rehearing *en banc,* and reverse the trial court's grant of summary judgment on all of the above claims.

II. THE COURT SHOULD GRANT REHEARING *EN BANC* IN THIS MATTER TO RESOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE.

Rule 35 also provides that rehearing *en banc* is appropriate when "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2); see also 10th Cir. R. 35.1(A) (*en banc* review serves to focus Court "on an issue of exceptional public importance"). In the present matter, Plaintiff's appeal raised a highly significant question about the scope of qualified immunity in excessive force cases. The Panel Decision decided this issue against Plaintiff, *sub silentio,* in an unpublished Order and Judgment. The issue, however, is one that demands a clear, reasoned, and definitive resolution.[4]

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[3] The trial court appeared to be in a similar unseemly hurry to reject Plaintiff's case at all costs, failing to even rule on Plaintiff's state law negligence claims against Defendants before dismissing the entire case. (See generally Aplt. App. at 0353-68; 0843-48; 0961-98; 1015-19.)

[4] The fact that the panel decision is "unpublished" does not mean that the Court may safely leave the issue for another day. Tenth Circuit Rule 36.3 permits the citation of "unpublished" opinions, and these opinions are in fact published on computerized legal research databases such as Westlaw. For example, the panel decision in the present matter is readily accessible at Garrison v. Polisar, 2000 WL 1140256 (10th Cir. filed Aug. 11, 2000).

Ordinarily, qualified immunity is "a powerful defense." Quezada v. County of Bernalillo, 944 F.2d 710, 718 (10th Cir. 1991), superseded on other grounds by Graham v. O'Connor, 490 U.S. 386 (1989). However,

> [t]he defense of qualified immunity is, as a practical matter, of limited value in excessive force cases. This is because police use of excessive force is a clearly established violation of constitutional rights. The focus of the substantive inquiry that decides the Fourth Amendment issue, whether the force used was objectively reasonable, is the same inquiry that determines whether qualified immunity is available to a government actor. Thus, the qualified immunity and excessive force analys[e]s do not differ in any significant respect.

(Aplt. App. at 0976 (citations omitted)); Quezada, 944 F.2d at 718; Mick v. Brewer, 76 F.3d 1127, 1135 n.5 (10th Cir. 1996); see also Street v. Parham, 929 F.2d 537, 540-41 (10th Cir. 1991) (trial court erred in instructing jury separately on excessive force and qualified immunity because "the determination of liability and the availability of qualified immunity depend on the same findings."). Thus, there is only one, "merged" inquiry regarding excessive force, *i.e.*, whether Defendants' use of force against Mr. Garrison was objectively reasonable under all of the surrounding circumstances.

This Court has not directly addressed whether the judge or the jury should resolve the ultimate, merged inquiry.

Cf. Myers, 80 F.3d at 424-25 (declining to review trial court's decision that "there was a genuine issue for trial regarding the reasonableness of defendants' conduct"); Sevier, 60 F.3d at 701 n. 10 ("[J]ury could conclude that Defendants acted recklessly by confronting [decedent] in the manner they did."). Generally, entitlement to qualified immunity is a legal question for the court to decide. Dixon v. Richer, 922 F.2d 1456, 1460 (10th Cir. 1991). However, whether force is "excessive" or "objectively reasonable" is almost always a fact issue for the jury to decide. Quezada, 944 F.2d at 715; Street, 929 F.2d at 541. n.2. These two lines of authority come into conflict when the qualified immunity and excessive force analyses merge.

Because the reasonableness of a particular use of force is an exceptionally fact-intensive inquiry that must take into account the "totality of the circumstances," Graham, 490 U.S. at 396, the merged inquiry is more appropriately left to the factfinder. If the ultimate inquiry is *not* left to the fact finder, then it removes from the jury not only those cases in which the court finds that the force used *was* objectively reasonable, but also those cases in which the court finds that it *was not,* exposing defendants as well as plaintiffs to more frequent judgments as a matter of law. Such a trend is inappropriate to an inquiry so dependent on the innumerable details of context.

The Panel Decision never directly addressed this issue. (See generally Petition Appendix.) It did, however, decide the issue *sub silentio*. Specifically, the Panel Decision did *not* restrict its review of Plaintiff's excessive force claims to bare legal sufficiency under Federal Rule of Civil Procedure 56. Cf. Myers, 80 F.3d at 424-25; Sevier, 60 F.3d at 701. Rather, the Panel Decision improperly reached the ultimate

inquiry, *i.e.*, whether the force used was in fact objectively unreasonable. (See generally Petition Appendix at 5-7).

The question Plaintiff raises is of "exceptional public importance," 10th Cir. R. 35.1 (A), and should not be decided *sub silentio,* because its resolution will dictate the course of almost every excessive force case in the Tenth Circuit. Specifically, in almost every excessive force case, the officer raises the defense of qualified immunity. The trial judge must thus decide whether to determine for him or herself if the officer's actions were "unreasonable," or rather, to simply determine whether a reasonable factfinder *could* find that the officer's actions were unreasonable. Trial courts presently have only oblique guidance on this constantly recurring issue. The Court should resolve the question clearly, and hold that trial courts are simply to determine whether there is sufficient evidence of unreasonableness to go to a jury. The Court should grant Plaintiff's petition for rehearing *en banc,* and reverse the trial court's summary judgment in Defendants' favor on Plaintiff's excessive force claims on this basis.

CONCLUSION

The Panel Decision is in serious conflict with this Court's and the Supreme Court's clear precedents in numerous respects. The Panel Decision also resolves incorrectly, and without any reasoning whatever, the exceptionally important question whether the trial judge or the jury should ultimately decide whether an officer's use of force is objectively reasonable for purposes of qualified immunity. For all of the above reasons, Plaintiff respectfully requests that this Court grant this Petition for Rehearing and Suggestion of Rehearing *En Banc,* reverse the trial court's

granting of the City Defendants' motions for partial summary judgment Nos. III, VI, and VII, and the County Defendants' motions for summary judgment on Plaintiff's civil rights claims and motion to dismiss Plaintiff's state law claims, and remand this matter to the district court for trial on the merits on Plaintiff's claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2000, I served the required number of true and accurate copies of Appellant's Reply Brief on the Clerk of the United States Court of Appeals for the Tenth Circuit and opposing counsel at the following addresses, by sending them to the Clerk of the Court via Federal Express, next day service, postage pre-paid, and by mailing them to opposing counsel:

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